

# Child prostitution in Thailand

The state as a barrier to its effective elimination

Candidate: Ornella Barros

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Supervisor: Else Leona McClimans, Stener Ekern.



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## **Abbreviations**

ACF	ASEAN Children's Forum
ACWC	ASEAN Commission for the Protection and Promotion of the Rights of Women and Children
AICHR	ASEAN Intergovernmental Commission on Human Rights
ASEAN	Association of Southeast Asian Nations
ATP	Anti-trafficking in Persons Committee
CRC	Convention on the Rights of the Child
ECPAT	End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes
ILO	International Labour Organization
MSDHS	Ministry of Social Development and Human Security
OHCHR	United Nations Office of the High Commissioner for Human Rights
OPSC	Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography
UNODC	United Nations Office on Drugs and Crime

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## 1 INTRODUCTION

*Not because you do not see it, it means they do not suffer it. Not because you do not do anything, it will be over. Indeed, it is what we are not doing to help that makes them more vulnerable to be exploited.*

It does not take very long to see in Patpong, one of the main red-light districts of Bangkok, a very busy street full of small markets and people offering a variety of items – from DVDs to underwear. Walking through the streets of this district at night is as overwhelming as listening to the loud music of the bars, the guy who sells DVDs while someone else is haggling the price, and then the sudden presence of a woman offering something written on a sheet similar to a restaurant menu; all at the same time. While trying to understand who was selling what, I also had to avoid the luxury cars that were passing slowly across the street, or which had stopped to talk to someone who approached them. The whole atmosphere of the street does not let you choose where to look at because people there have already seen you; they want to catch not only your attention but also your money as a potential client.

As I walk along the street it looks different; not as many markets as in the previous corner, but instead a lot of karaoke bars, massage parlors, go-go bars, establishments advertising "ping pong shows," and another woman with the sheet of paper similar to a restaurant menu. This time, the situation caught my attention because of the seven young girls who were sitting on stools behind her. The content of what she was selling, by using the sheet of paper, was the pictures of the girls available to buy either for an hour, a couple of hours, or a night. The girls were talking amongst themselves while the pimp was doing her job. In the meantime, I was just trying to identify how many of these girls were not even 16 years old; and certainly, there were some.

Child prostitution is frequently related to child trafficking because children who are subject of trafficking may find themselves involved in prostitution, pornography, and street beg-

ging, among other exploitative practices.<sup>1</sup> While several perspectives could be used to approach the issue of child trafficking, through this study I aim to present from a human rights perspective the key legal, political, and social factors that may explain the inefficiency of the Thai government in the suppression<sup>2</sup> of child prostitution. Although similarities with other contexts are evident, I will argue that in the particular case of Thailand the inefficiency is due to the shortcomings of the law, as well as to the political and social conditions –in both regional and domestic level– that hinder the enforcement of the legal provisions.

## 1.1 Aim and Purpose

The fact that the three types of climate in Thailand include the word *tropical*<sup>3</sup> becomes as one of the reasons why millions of tourists arrive during the year to this Southeast Asian country. Thailand's climate as well as its natural wonders, makes the country a tourist destination; but also a target for prostitution and sex tourism. Considering that young people predominantly compose the population in Thailand, with 70 percent between the ages of 15 and 64, 24 percent below 15 years old and only 6 percent older than 64 years,<sup>4</sup> the existence of child prostitution is an issue that cannot pass unnoticed.

Thailand is the third largest country of the Southeast Asian region after Indonesia and Myanmar. With an estimated population over 66 million<sup>5</sup>, there are more than 3.5 million persons without Thai nationality living in the country, including children of migrants born in

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<sup>1</sup> Scarpa, 2006:430

<sup>2</sup> The words “suppression” and “elimination” are used based on the legal provisions referred in this paper, which call for the states’ responsibility to guarantee human rights. In such scenario, no one should be subject of any form of slavery. Therefore, no one should be subject of commercial sexual exploitation.

<sup>3</sup> Ministry of Public Health. Thailand Country Profile. Available at: [http://www.moph.go.th/ops/thp/images/stories/Report\\_pics/CD\\_ROM53/Eng/Chapter2.pdf](http://www.moph.go.th/ops/thp/images/stories/Report_pics/CD_ROM53/Eng/Chapter2.pdf) [Accessed: 1st of March, 2013]

<sup>4</sup> Thailand, Country Overview. <http://www.nationsencyclopedia.com/economies/Asia-and-the-Pacific/Thailand.html> [Accessed: 19 January, 2014]

<sup>5</sup> World Bank. Data Thailand. Available at: <http://data.worldbank.org/country/thailand> [Accessed: 1 February, 2014]

UN data. Thailand country profile. Available at:

<http://data.un.org/CountryProfile.aspx?cname=Thailand#Map> [Accessed: 1 February, 2014]

Thailand.<sup>6</sup> In this regard, migration represents one of the main issues that the Thai government has in relation to human trafficking. According to the Global Slavery Index 2013, Thailand is in the top ten ranking of the countries with the highest numbers of enslaved people, in which child prostitution is part of the definition.<sup>7</sup> In addition, according to the Trafficking in Persons Report 2013, Thailand is placed on Tier 2 Watch List –countries where governments do not fully comply with the minimum standards of the Trafficking Victims Protection Act<sup>8</sup>– for a fourth consecutive year.

Unlike other Southeast Asian countries, Thailand remains as the only country of the region that has never been colonized by the European power.<sup>9</sup> Its political instability in recent decades represents an important aspect that has shaped relevant social issues within the Thai society. The opposition wing has succeeded since post II World War in bringing to the public discussion illegitimate acts of corruption within the turn governments. Such demonstrations have led to military coups, resignations, and several manifestations; sometimes with tragic consequences. The most recent political crisis in Thailand is in relation to the protests of opposition supporters against a proposed political amnesty bill that critics say would allow ousted leader Thaksin Shinawatra –the brother of Prime Minister Yingluck Shinawatra– to return to Thailand without facing jail for charges of corruption.<sup>10</sup> Although there is an invaluable respect towards the king, the Thai society has been generally mobilized against the high rates of corruption that have persisted in the recent history of the constitutional monarchy.

In 2007, with a new Constitution, important changes were about to come, such as the first time that civil society was constitutionally called to participate in policy-making processes.

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<sup>6</sup> International Organization for Migration (IOM). “Thailand Migration Report 2011”. Available at: [http://publications.iom.int/bookstore/free/TMR\\_2011.pdf](http://publications.iom.int/bookstore/free/TMR_2011.pdf) [Accessed: 3 February 2014].

<sup>7</sup> Walk Free Foundation. “Global Slavery Index 2013”. Available at: <http://www.globalslaveryindex.org/report/?download> [Accessed: 3 February 2014].

<sup>8</sup> See Tier Placements 2013. Available at: <http://www.state.gov/j/tip/rls/tiprpt/2011/164228.htm>

<sup>9</sup> Or at least not in the oppressive way that happened in neighbor countries. See “Indochina: An Ambiguous Colonization, 1858–1954”, By Pierre Brocheux and Daniel Hémerly. Also: Cambodia Tribunal Monitor, Available at: <http://www.cambodiatribunal.org/history/cambodian-history/>

<sup>10</sup> BBC. “Thailand Profile”. Available at: <http://www.bbc.co.uk/news/world-asia-15641745> [Accessed 2 February, 2014].



However, the political tensions that have remained in last two decades have made a difficult transition. With a majoritarian rural population, Thailand represents the ongoing process of legitimization of democratic state institutions, while preserving the religious principles that the Buddhism has imparted in the culture. Undoubtedly, politics has a relevant role in preventing human rights violations, but the impact of the Thai political instability has left behind effective measures to eliminate issues such as child prostitution.

Although Thailand has ratified both the Convention on the Rights of the Child (CRC), and the Optional Protocol to the CRC on the Sale of Children, Child Prostitution, and Child Pornography (OPSC), the situation of child sexual exploitation has not had a significant improvement in the last decades. Whereas child prostitution happens all across the world, Thailand is a relevant example of the deplorable situation of children exploited in the sex industry, for which laws and protection have not been properly guaranteed by the state. Besides, with endless episodes of political crisis in the recent years, Thailand has had to face the lack of continuity of policies to address important issues such as human trafficking.

With this social picture in mind, this research aims to answer **“What factors may explain the inefficiency of the Thai government in the elimination of child prostitution?”** To address this issue, I will take into account the following guiding questions:

- **What is the role of the existing legal frameworks in the elimination of child prostitution in Thailand?**
- **How is the Thai government attempting to eliminate child prostitution? And, to what extent are these policy initiatives efficient?**

Along the study process control variables such as migration and political situation will be essential to establish nexus between the research question and the resources to be implemented in the development of the argument.

## **1.2 Definitions**

In order to provide an assertive approach to the issue of child prostitution in Thailand, it is necessary to clarify first the meaning I will give to certain terms that will be included in

this document. When referring to child prostitution, it implies broader categories such as human trafficking. When referring to “child” the legal implications of prostitution take a new level that crucially defines the protection of children in risk of exploitation. The following section will provide the clarifications that are needed regarding these key terms.

### 1.2.1 Child

For the purpose of this study, child will be understood as a person below the age of 18, in accordance to the definition of the Convention on the Rights of the Child.<sup>11</sup>

### 1.2.2 Human Trafficking

Despite the endless debate around the understanding of prostitution within the category of human trafficking, considering the voluntary and involuntary aspect of this practice, this document will use the word human trafficking based on the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children, supplementing the united nations convention against transnational organized crime* definition, as follows:

*“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”<sup>12</sup>*

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<sup>11</sup> CRC, Article 1.

<sup>12</sup> G.A. Res. 55/25, Annex II, U.N. Doc. A/Res/55/25 (Jan. 8, 2001), [hereinafter Palermo Protocol]. This Protocol supplemented the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Mar. 21, 1950, 96 U.N.T.S. 271, and gave added protections to those discussed in the Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

In this sense, although child prostitution fit within this category of human trafficking, human trafficking *per se* does not necessarily mean prostitution. The legal implications of such distinction will be further outline in Chapter 3.

### 1.2.3 Child prostitution

Under international law, the trafficking of children does not need to involve coercion or force to be considered as a crime. On the contrary, any person under the age of eighteen involved in practices such as prostitution is trafficked, regardless of consent or the tactics used in the recruitment.<sup>13</sup> In this sense, for the case of child prostitution the voluntary and involuntary aspect of prostitution is reduced to the fact that the child is the victim no matter the causes that conducted her or him to the sex industry.

With this is mind, in order to clarify what I will mean by child prostitution in this document, is the definition established in the OPSC in the Article 2(b), as follows: “*Child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration*”.<sup>14</sup>

## 1.3 Methodology, limitations, and ethical considerations

This study aims to approach the issue of child prostitution from a human rights perspective through the use of Thailand as a case study. As Anastas suggests, a case study is an in-depth study of a particular research problem.<sup>15</sup> This specific approach results useful when analyzing a case from both its particularities as well as from its complexities.<sup>16</sup> In this sense, the unit that will be covered throughout this research will be Thailand.

What certainly distinguishes the case study from other research designs is its *idiographic* approach. According to Bryman, such approach refers to the permanent interest of the author in elucidating the unique features of the case in question.<sup>17</sup> By doing so, the study fills the design criteria of reliability, replicability, and validity. For the purpose of this research,

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<sup>13</sup> Alden, 2006:512

<sup>14</sup> OPSC, Article 2(b)

<sup>15</sup> Anastas, 1999:95

<sup>16</sup> Stake, 1995:xi

<sup>17</sup> Bryman, 2004:54

Thailand will be used as an *exemplifying case*<sup>18</sup> in relation to child prostitution as phenomena of study. As illustrated by Yin, *exemplifying case* is chosen either because it represents a broader category of cases or because it provides a suitable context for certain research question.<sup>19</sup> In this regard, Thailand as the chosen case study is used for the application of law in context; based on the value of the law as the legal foundations for the protection of children. Being aware of the importance of supplementing laws with additional elements, this study will use the existing legal frameworks in domestic, regional, and international level, to illustrate the factors that need to be in place in order to enforce laws successfully.

The strategy applied in the Thai case was primarily a qualitative study. Based on international, regional, and domestic legal provisions as primary sources, this research was conducted by analyzing the legal situation of the issue in relation to the unit of study. Official documents such as bilateral agreements between the government of Thailand and neighbor countries were also used as primary source. Moreover, semi-structured interviews were conducted with stakeholders during fieldwork. With a remarkable contribution from ECPAT International, ECPAT Foundation, Plan International Thailand Foundation, Child-line Thailand, Forum-Asia, and two youth activists from the province of Chiang Rai, this study retrieves the theory together with the expertise from the field. For ethical sensitiveness, the youth activists interviewed has requested anonymity, reason why I will refer to them as “Youth Activist 1” and “Youth Activist 2”, respectively. As secondary sources, academic articles, textbooks in relation to the situation of children in Thailand, as well as state-report to the CRC Committee supplemented the research by providing previous studies and approaches to the issue.

One of the main criticisms around the case study design is its limitation to establish generalization. Whereas it is true that generalization is mostly related to quantitative strategies, it does not exclude qualitative research from the possibility to establish it. In other words, it is necessary to take into account that the findings of qualitative research might aim to gener-

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<sup>18</sup> Ibid. 56

<sup>19</sup> Yin, 2003:41

alize theory rather than to populations.<sup>20</sup> As Mitchell points out, it is the quality of the theoretical inferences that are made through qualitative data what matters for the assessment of generalization.<sup>21</sup> While this research does not aim to claim for generalization, the analysis of the variables related to the Thai case might coincide with specific features of other country-cases dealing with the same phenomena. These eventual similarities are part of what Bryman refers as *moderatum* generalization.<sup>22</sup> In this sense, the comparison and linkages associated with particularities of other cases might help building understanding of broader issues and categories, such as child sexual exploitation.

Concerning limitations, this research has faced at least three relevant aspects to be considered. First, although child prostitution has been an increasing type of human trafficking, academic research on this issue has not. Although when the CRC came into force there was an opportunity for massive documentation and research on violation of child rights, besides Heather Montgomery, there is not as many scholars following the evolution of child prostitution as one might expect. It does not mean, though, that there is not academic articles, manual, or campaigns dealing with the issue. However, when it comes to the theory of child prostitution the literature lacks in describing contemporary approaches and contextualization of the causes.

Secondly, although the research topic might be covered from several angles, the selection of the focus represented a challenge at the beginning of this research. Working on child prostitution as a human rights issue very often questions whether the approach should be a sociological or a legal one. Even anthropologists have addressed the issue because of the human condition of a child as someone “vulnerable” who needs special protection. However, while doing fieldwork it gets even more difficult because such kind of exploitation also incorporates cultural and social aspects that cannot pass unnoticed. In this sense, although for the purpose of this study the choice of method was in terms of applying law in context, it will not be limited by *de lege lata*. On the contrary, this study will attempt to apply a ho-

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<sup>20</sup> Ibid. 392

<sup>21</sup> Mitchell, 1983:207

<sup>22</sup> Bryman, 2008:392

listic legal approach that will take into account other variables that should work in accordance to the law, but that do not work on their own. Such variables are often related to social and political components that determine the dynamic of societies, and which combined with law might enhance an understanding of the gap between what the law says and what the law is when applied in context.

The third limitation was directly related to the fieldwork. The current political situation of Thailand explained above represented a relevant obstacle while doing fieldwork for this research. The political instability of the country implied a change of priorities in the agendas of stakeholders. Governmental institutions and ministries were actually taken by protestors, and it was not possible to get information from representatives of the government. Besides, the language represented another challenge. The impossibility of communicating in Thai made the retrieving of testimonies of locals in relation to the issue difficult.

In relation to ethical considerations, this study has complied with getting the approval of the people interviewed to be quoted in the document. Likewise, being aware of the diverse perspectives around child prostitution as a human rights issue, this study does not attempt to re-victimize children exploited by the sex industry. On the contrary, this research outline a more structural perspective of the current situation of child prostitution in Thailand, through the analysis of the current implementation of legal frameworks as a starting point to identify what might be done in the future.

#### **1.4 Issue and context**

Since the 80's decade, tourism has been an important source of economic income for Thailand.<sup>23</sup> The increasing in the number of tourists visiting across the country has been consistent during last three decades. However, one of the negative consequences of Thailand's tourism industry is the prostitution of its women and children.

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<sup>23</sup> Thailand, Country Overview. <http://www.nationsencyclopedia.com/economies/Asia-and-the-Pacific/Thailand.html> [Accessed: 2nd of March, 2014]

Under the 1997 Constitution, Thailand made relevant legal progress in the promotion and protection of children's rights; but it was not until the new constitution of 2007 that challenges related with violation of children's rights were addressed through the immediately enforcement of the provisions without prerequisite of organic law.<sup>24</sup> This significant change facilitated the social mobilization in favor of child rights, and in a particular way, against commercial sexual exploitation. In this sense, legislative initiatives like The Children and Youth Development Act 2007 tried to strengthen institutions addressing the challenges confronting children and youth, especially their participation in development activities.<sup>25</sup> This initiative enforced the establishment of national and local mechanisms to promote the participation of children and youth in their own development, which has meant an important step toward the full exercise of children citizenship.

The discussion about child prostitution in Thailand goes between the socio-economic factors and the cultural conventions that, to some extent, influence the recruitment of children for the sex industry. On the one hand, there are arguments that refer the extreme poverty, or the desire to make what little money they can to help themselves and their families, as the main impetus for women and children to be involved in the sex trade.<sup>26</sup> Although Thailand has made a significant progress in the elimination of poverty recent years, the aftermath of the previous rates include that parents often feel obligated to sell their children to pimps because their low salary does not allow them to meet the needs of their family.<sup>27</sup> Thus, children are vulnerable target for networks of commercial sexual exploitation.

Besides, according to ECPAT International (End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes), the existence of demand for sex with children and individuals wanting to exploit vulnerable children in order to make profit has

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<sup>24</sup> UNICEF. Situation Analysis of Children and Woman in Thailand 2011.  
[http://www.unicef.org/thailand/1045\\_UNICEF\\_Final\\_row\\_res\\_230911.pdf](http://www.unicef.org/thailand/1045_UNICEF_Final_row_res_230911.pdf) [Accessed: March 1, 2014]

<sup>25</sup> UNICEF. Situation Analysis of Children and Woman in Thailand 2011.  
[http://www.unicef.org/thailand/1045\\_UNICEF\\_Final\\_row\\_res\\_230911.pdf](http://www.unicef.org/thailand/1045_UNICEF_Final_row_res_230911.pdf) [Accessed: March 1, 2014]

<sup>26</sup> Bales, 2007:269

<sup>27</sup> Children's rights portal. Child prostitution: the curse affecting every continent.  
<http://childrensrightsportal.org/child-prostitution/> [Accessed March 4, 2014]

resulted in many children in Thailand being victimized through trafficking for sexual purposes, prostitution and pornography. This poverty approach to child prostitution stresses in the vulnerability of children as individuals but also in the marginalization that surrounds them.

However, prostitution –as any other social phenomena– evolves. In the Thai case, a couple decades ago the issue had another cause besides the economic factor. In the 90's, scholars like Heather Montgomery started looking for cultural factors that would explain the constant increasing enrollment of children in the commercial sexual exploitation networks. Indeed, Montgomery found through her fieldwork in the north of Thailand in the community of Baa Nua, relevant aspects that would drastically change both the perception of the problem and the formulation of alternatives to solve it. According to her, the religious convictions play an important role in the motivations to get incomes as soon as a child can, considering that children in Baan Nua feel obligation to pay back to their parents through financially support what they have done in children life. Thus, one of the evidences of her study revealed *“even though Buddha showed his mother the way to enlightenment, he could not pay back the debt he owed her for giving birth to him”*.<sup>28</sup> Following her study, reciprocity shapes in a high level the relation between parents and children, even though this reciprocity is not equal and has a higher price for children.

By far, prostitution represents a source of significantly more income than other jobs and despite the stigma of prostitution, a powerful mitigation circumstance for many children is the fact that they can earn money to help their parents.<sup>29</sup> This perspective challenges the passive role of children in the enrollment of this practice, but it does not exclude the fact that children are at the same time victims of those who take advantage of the cultural conventions to exploit them. Nonetheless, this cultural perspective must be understood also through a social status matter. In the same line than Montgomery, Lisa Rende Taylor supplement the cultural approach to child prostitution in Thailand suggesting that daughters

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<sup>28</sup> Montgomery, 2001: 89

<sup>29</sup> *Ibíd.* Pp. 90



from both poor and relatively well-off families become prostitutes in roughly equal proportions.<sup>30</sup> The conception of social status as a vehicle to enroll prostitution business, and the fact that not only poor children are part of the prostitution networks discard poverty as the principal cause of child prostitution in Thailand. According to Taylor's findings, interventions to stop sex trafficking must address such factors as a girl's need to earn money for family status.<sup>31</sup>

Regardless of the cause, Thailand has been active in forming task forces, commissions, and overhauls of the law relating to trafficking and prostitution. Some legal acts have actually punished the procurers, the brothel owners and even the families who sold their children into prostitution. Even brothels were targeted for closure and lots of them actually closed. However, as the law has developed so has the industry. Brothels closed to be reopened in a more sophisticated form as karaoke bars, massage parlours and even restaurants.<sup>32</sup> The response of the sex industry to the new laws has been to "clean up" the most visible parts of the trade.<sup>33</sup> Nonetheless, it does not mean that the issue has disappeared. On the contrary, the "invisible" trafficking in Thailand is more obvious than what it seems.; and the analysis of the legal situation will be helpful to understand the strenghts and weaknesses when dealing with child sexual exploitation.

## **1.5 Structure of Thesis**

This study will analyze child prostitution in Thailand as an exemplifying case of how the implementation of the law requires more than ratifications and international commitment. Chapter 2 will outline the international, regional, and domestic existing legal frameworks dealing with the issue of child prostitution. By doing so, it will make possible to understand what are the available instruments to counteract the effects of this particular type of human trafficking. It will essentially describe how the international provisions are applied into both regional and domestic levels.

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<sup>30</sup> Bower, 2005:200

<sup>31</sup> Rende, 2005:411

<sup>32</sup> Brown, 2000:194

<sup>33</sup> Ibid.

Chapter 3 will provide an analysis on the implementation of the international, regional, and domestic legal frameworks. It will highlight the factors that contribute to the inefficiency of the Thai state in eliminating child prostitution. By taking into consideration the State's Report on the OPSC and the recommendations emitted by the Committee on the Rights of the Child, this chapter will bring the legal provisions into focus. The issue of implementation without enforcement is probably one of the main elements when it comes to the legal instruments to deal with human trafficking. Likewise, it will show the extent to which variables such as political will and migration play a crucial role to progress in the elimination of child prostitution.

Finally, chapter 4 will conclude the study by putting the spotlight on the challenges to apply human rights law in context. It will include an overview of the implementation of the legal provisions in the case of Thailand, and will close with the main findings in the light of the past, present, and future of child prostitution in this Southeast Asian country.

## **2 CHILD PROSTITUTION IN THE LEGAL SPHERE**

Unlike adult-prostitution, child-prostitution is classified by the International Labor Organization (ILO) as one of the worst forms of child labor. For this reason, when it comes to the existing legal frameworks regarding child prostitution, the core aim is not only to prevent child prostitution as such, but also to protect children from any kind of exploitation. As previously outlined, the voluntary aspect does not take place in the matter of child prostitution. All cases, regardless the technic through which children were recruited for the sex industry, are considered as child sexual exploitation under international human rights law.

In this sense, the following chapter will be divided into three main sections that will account for the existing international, regional, and domestic legal instrument to address child prostitution as a human rights violation.

### **2.1 The Convention on the Rights of the Child**

The convention on the Rights of the Child (CRC) is not only the most ratified human rights treaty in the history –192 countries except United States and Somalia–, but it was also the first legally binding international instrument to incorporate the full range of human rights—civil, cultural, economic, political and social rights.<sup>34</sup> Its existence is justified by the global acceptance of both children as subject of protection and children as subject of rights. Unlike previous international documents –such as the Geneva Declaration of the Rights of the Child (1924) and the Declaration of the Rights of the Child (1959)<sup>35</sup>–, the CRC does not only reaffirm the important status of children within society, but also stresses in the role of children as active citizens that deserve to be treated as such. Thus, protection in the framework of the CRC is not understood anymore within the exclusive terms of vulnerability, but in a more holistic approach to childhood.

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<sup>34</sup> UNICEF. Convention on the Rights of the Child. Available at: <http://www.unicef.org/crc/> [Accessed 1st March, 2014]

<sup>35</sup> Humanium. Declaration of the Rights of the Child. Available at: <http://www.humanium.org/en/childrens-rights-history/references-on-child-rights/geneva-declaration/> [Accessed 1st March 2014].

The Guiding Principles represent the five pillar rights of the CRC. They are crucial in defining the nature of the rights included in the convention, due to its relevance when it comes to the plenty exercise of all rights. In this sense, the Article 1 clarifies the definition of a child, in order to establish a minimum standard when implementing the CRC. Knowing that *“the Convention defines a 'child' as a person below the age of 18, unless the laws of a particular country set the legal age for adulthood younger”*<sup>36</sup>, the second pillar contained in the Article 2 helps in establishing a principle of non-discrimination regardless any kind of cultural, ethnic, or religious condition of the child. However, the three remaining principles are those that actively determine the responsibility of the state as the first stakeholder of child rights.

In this regard, the third pillar ascertains in claiming for the best interest of the child when deciding on anything that affect them. Article 3 then states as follows: *“All adults should do what is best for children. When adults make decisions, they should think about how their decisions will affect children. This particularly applies to budget, policy and law makers”*.<sup>37</sup> This pillar is complemented by the Article 6, which stands for children’s right to live, as well as the governments’ obligation to *“ensure that children survive and develop healthily”*.<sup>38</sup> These articles are central in the line of protecting child rights. However, it is the fifth pillar that concedes children an active role in exercising their rights. In this sense, Article 12 establishes the participative aspect of children in decisions that affect their development. The right to participation is not limited to listening, but actually to express their opinions in topics that concern children.<sup>39</sup> By doing so, the holistic view of childhood from the perspective of the CRC does not end up in the protection of the child as an object of society, but the protection of the child as a subject of rights.

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<sup>36</sup> CRC, Article 1.

<sup>37</sup> CRC, Article 3.

<sup>38</sup> CRC, Article 6.

<sup>39</sup> CRC, Article 12.

### 2.1.1 The CRC and the issue of child trafficking

After going through the five pillars that play as general requirements for all rights, it is important to identify how the CRC deals with child labour and child prostitution. The CRC includes five articles directly related to the issue of child trafficking, namely: Articles 32, 33, 34, 35, and 36. All them, approach the issue of child labour from different categories and conditions to be guaranteed. Whereas the Article 32 (1) recognizes the importance to protect children from any kind of exploitation, the Article 32 (2) prevents states parties to take measures for children working on areas that do not constitute a harmful job for them.<sup>40</sup>

While it is true that child prostitution is considered as one of the worst forms of child labour, the CRC stresses on the importance to protect children regardless the kind of job they are involved into. On the one hand, Article 33 deals with the “*appropriate measures, including legislative, administrative, social and educational measures*”<sup>41</sup> to protect children from the use of illicit drugs as well as from its production and trafficking. On the other hand, it is the Article 34, which actually addresses the issue of child trafficking. This article does not only prevent states parties to protect children from sexual exploitation, but also encourage them to take measures in cooperation with other states, as follows:

*“States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:*

*(a) The inducement or coercion of a child to engage in any unlawful sexual activity;*

*(b) The exploitative use of children in prostitution or other unlawful sexual practices (...)*”<sup>42</sup>

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<sup>40</sup> CRC, Article 32.

<sup>41</sup> CRC, Article 33.

<sup>42</sup> CRC, Article 34.

Although this provision is not explicit in the “trafficking” aspect of sexual exploitation, the fact that it recognizes the importance of working together with other states parties in the prevention of child exploitation, gives value to the migration aspect of child trafficking. Besides, despite the undefined scope of “*unlawful sexual activity*”, this article explicitly includes prostitution as a kind of child sexual exploitation. Article 35 points out the states’ responsibility to take “*all appropriate national, bilateral, and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form*”.<sup>43</sup> According to the article, states parties are not only expected –and compelled– to take measures, but to take *all* measures in *all* levels in order to protect children from trafficking. In addition, states parties should account for the traffic of children regardless the *purpose or form*.

Article 36 acts as supplementary provision of the previous statement, by reaffirming the states parties’ duty to protect children “*against all other forms of exploitation prejudicial to any aspects of children’s welfare*”.<sup>44</sup> Considering child prostitution as a form of child trafficking –but not the only form–, the integral approach of states’ responsibility in preventing traffic of children represents a step forward in the achievement of human rights. In addition to the states’ obligation to protect children, the CRC also establishes through the Article 39 the right of children victims of exploitation to be reintegrated “*in an environment which fosters the health, self-respect and dignity of the child*”.<sup>45</sup>

### 2.1.2 The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OPSC)

As important as it was to establish minimum standards in order to guarantee the full development of children, the CRC was not specific enough to make states accountable for child trafficking. Child trafficking was brought into the international discussion as a global issue early 1974 when a Working Group on Slavery was established.<sup>46</sup> Ever since, United

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<sup>43</sup> CRC, Article 35.

<sup>44</sup> CRC, Article 36.

<sup>45</sup> CRC, Article 39.

<sup>46</sup> UNICEF, 2009:3

Nations has continuously prioritized the issue of child exploitation alongside with the evolution of the human rights discourse. The OPSC is one of the three optional protocols of the CRC dealing with the major human rights violations faced by children worldwide.

The OPSC was adopted by the United Nations General Assembly on May 2000, and entered into force on January 2002. By that time, the OPSC remarked an important step towards concrete measures to protect children from sexual exploitation, among other types of trafficking. Unlike the CRC, the OPSC does not include a definition of a child, which leads to assume that the scope of application is coherent to the age established in the Article 1 of the CRC –all persons bellow 18 years old–. However, the Article 1 of the CRC also says that such standard applies “*unless under the law applicable to the child, majority is attained earlier*”.<sup>47</sup> This ambiguity has brought relevant criticism, especially when it comes to the countries in which prostitution is a legal practice. In these cases the protection of children involved in the sex industry struggles with the domestic laws that may consider an individual as a child until a very early age. This is the case of Iran, one of the lowest national ages of majority, where girls reach this threshold at just 9 years old, compared with 15 for Iranian boys.<sup>48</sup>

Despite the lack of explicit definition of a child, the OPSC does start the provisions with the states’ duty to “*prohibit*” the sale of children, child prostitution and child pornography as provided by the protocol. Article 2 provides a definition of the practices prohibited in the framework of this instrument, and together with the Article 3 outline the acts that, “*as minimum*”, should be “*fully covered*” by the criminal and penal legislation of states parties. In this sense, child prostitution is not only explicitly defined by the OPSC as “*the use of a child in sexual activities for remuneration or any other form of consideration*”<sup>49</sup>, but it is also expected to be conceived as a criminal action that requires penal procedures from the states.

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<sup>47</sup> CRC, Article 1.

<sup>48</sup> UNICEF, 2011:8

<sup>49</sup> OPSC, Article 2(b)

The obligations of states parties under the OPSC might be identified into four categories that together aim to achieve a holistic and opportune protection of children. The first one is regarding the repression of the crime, contained in the Articles 4 to 7, which incorporates issues such as extraterritorial jurisdiction, extradition, mutual legal assistance and confiscation of proceeds and instrumentalities. Then, there is the category of protection of the victims. This is included in the Article 8 as the measures that should be taken by the states during the process of prosecution, ensuring that *“in the treatment by the criminal justice system of the children who are victims of the offences described in the protocol, the best interest of the child shall be a primary consideration”*.<sup>50</sup> Article 9 brings the attention to the category of states’ actions to address prevention and remedies for victims. By doing so, *“states parties shall adopt or strengthen, implement and disseminate laws, administrative measures, social policies and programmes to prevent the offences referred to in the Protocol”*.<sup>51</sup> Besides, the provision stresses on the particular attention that shall be given *“to protect children who are especially vulnerable to these practices”*.<sup>52</sup>

As shown, the preventive scope is not restricted to the states’ attempts to disseminate the law and to raise awareness, but it goes further, by expecting states parties to take responsibility for the identification and protection of children in risk of trafficking. For this reason, Article 10 of the OPSC includes as last category the international cooperation for the elimination of child trafficking. According to this provision, states parties shall strengthen international cooperation by multilateral, regional and bilateral arrangements *“for the prevention, detection, investigation, prosecution and punishment of those responsible for acts involving the sale of children, child prostitution, child pornography and child sex tourism”*.<sup>53</sup> Although the OPSC does not explicitly includes *“sex tourism”* as a crime, it is directly related to the offences covered by the Protocol, since it often involves child prostitu-

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<sup>50</sup> OPSC, Article 8(3)

<sup>51</sup> OPSC, Article 9(1).

<sup>52</sup> Ibid.

<sup>53</sup> OPSC, Article 10(1).



tion and child pornography (as those who exploit child prostitutes often record their activities on film), and may also involve the sale of children.<sup>54</sup>

According to the Article 10(1), states parties shall also “*promote international cooperation and coordination between their authorities, national and international non-governmental organizations and international organizations*”.<sup>55</sup> In the same line, the Article 10(3) establishes that such cooperation should “*address the root causes, such as poverty and underdevelopment*”<sup>56</sup> as contributing factors of child trafficking. Undoubtedly, the OPSC represents a good instrument to combat child trafficking, considering its holistic approach to implementation, which does not only focus on prosecution but also in recovery and reintegration of the victims. Although the OPSC encourages legitimate processes to reestablish the rights of children victims of trafficking, there are concerns that the protocol does not protect children from victimization in criminal processes once they have been recognized as having had their rights violated.

### 2.1.3 ILO – Convention No. 138 and Convention No. 182

The global concern with child exploitation that led to the adoption of the OPSC also led to the adoption of other two outstanding international instruments, namely: The International Labour Organization Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (“Worst forms of Child Labour Convention” No. 182) and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime (the “Palermo Protocol”).

On the one hand, in 1973 the International Labour Organization (ILO) adopted the Convention No. 138 which represented a remarkable attempt to eliminate child labour. By establishing a threshold for minimum age for admission to employment, the Convention No.138 coincided with the content that was going to be included in the Articles 28 and 32 of the

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<sup>54</sup> UNICEF, 2009:12

<sup>55</sup> OPSC, Article 10(1).

<sup>56</sup> OPSC, Article 10(3).

CRC –as the right to education and the right to be protected from exploitation, respectively–. Thus, the ILO Convention No.138 classifies the minimum age for admission to employment within three categories, as follows: hazardous work, basic minimum age, and light work. These three categories are in accordance with two additional criteria: the minimum age at which children can start work, and the possible exceptions for developing countries.

The first category concerning hazardous work, included in the Article 3, establishes that *“any work which is likely to jeopardize children’s health, safety or morals should not be done by anyone under the age of 18”*.<sup>57</sup> The exception to the rule is the age of 16 as long as it happens under *“strict conditions”*. The second category contained in the Article 2(3) states that *“the minimum age specified shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years”*.<sup>58</sup> In this order, the third category follows the establishment of the minimum age with the clarification of what constitutes *“light work”*. Then, according to the Article 7, *“children between the ages of 13 and 15 years old may do light work, as long as it does not threaten their health and safety, or hinder their education or vocational orientation and training”*.<sup>59</sup> The exception to the rule for developing countries varies between 12 to 14 years old depending on the need of the context.

Although the minimum standards established by the ILO Convention No.138 were relevant steps toward the prevention of child labour, some legal gaps remained; especially in regard to the specific meaning of *“light work”*, as well as the extent to which the *“developing countries”* criteria would give flexibility for the countries to not compel with the aim of the Convention.

On the other hand, it is the ILO Convention No.182 –adopted in 1999– which actually requires immediate actions from the states in order to prohibit and eliminate the worst forms

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<sup>57</sup> ILO. Convention No. 138 (3)

<sup>58</sup> ILO. Convention No. 138 (2:3)

<sup>59</sup> ILO. Convention No. 138 (7)

of child labour “*as a matter of urgency*”. Unlike the OPSC, the Convention No.182 explicitly includes a definition of a child in accordance with the CRC. In terms of what constitutes “worst forms of child labour”, the Convention No.182 defines in the Article 2, as follows:

- “(a) All forms of slavery or practices similar to slavery, such as the sale and trafficking of children; (...)*
- (b) The use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances; (...)*
- (d) Work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children”*.<sup>60</sup>

Similarly to the OPSC, the Convention No.138 convers within the framework of worst forms of child labour different categories, such as child prostitution, child pornography, and drug trafficking. Convention No. 182 complements Convention No. 138, which in its turn provides the basic framework for national and international action for the elimination of child labour. In this sense, Convention No. 182 focuses on the worst forms as a priority target, while Convention No. 138 sets forth the ultimate long term objective of the effective abolition of child labour, and also clarifies what should be targeted as child labour by providing for the minimum age standards.<sup>61</sup>

Article 6 provides that “*each member shall design and implement programmes of action to eliminate as a priority the worst forms of child labour*”.<sup>62</sup> By ascertaining child labour as a “priority” issue, states parties are also expected to “*take all necessary measures to ensure the effective implementation and enforcement of the provisions (...) including the provision and application of penal sanctions or, as appropriate, other sanctions*”.<sup>63</sup> Likewise, the Convention highlight together with the legislative aspect the importance to take into ac-

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<sup>60</sup> ILO. Convention No.182 (3)

<sup>61</sup> United Nations. Child Labour, Available at: <http://www.un.org/en/globalissues/briefingpapers/childlabour/intlconvns.shtml> [Accessed: 4 March, 2014].

<sup>62</sup> ILO. Convention No.182 (6)

<sup>63</sup> ILO. Convention No. 182 (7:1)

count the education in the elimination of child labour, by taking *effective and time-bound measures* to:

*“(a) Prevent the engagement of children in the worst forms of child labour.*

*(b) Provide the necessary and appropriate direct assistance for the removal of children from the worst forms of child labour and for their rehabilitation and social integration.(...)*

*(d) Identify and reach out to children at special risk”.(...)*<sup>64</sup>

Whereas the Convention No.182 stresses on the importance to incorporate effective measures in order to guarantee the re-establishment of the rights for children victims of child labour, it also encourages states members to strengthen international cooperation and joined actions to counteract the impact of child labour. Thus, Article 9 provides that states members shall “*enhanced international cooperation and/or assistance including support for social and economic development, poverty eradication programmes and universal education*”<sup>65</sup> as contributing factors for worst forms of child labour.

## **2.2 The ASEAN and Child Rights**

As outlined so far, the international legal instruments to combat child trafficking are likely to be in the framework of the CRC and the OPSC, as well as in the arena of the provisions established by the ILO in relation to minimum age for admission to employment, and the worst forms of child labour. Nonetheless, the international framework is not enough on its own. Regional and domestic instruments are as important as internationals when it comes to human rights. Unlike Europe, Africa, and Americas, Asia does not have a regional system for the protection of human rights.

For the matter of this study, the regional organization that will be taken into account to approach the existing legal instruments in regard to children will be the ASEAN –Association

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<sup>64</sup> ILO. Convention No. 182 (7:2)

<sup>65</sup> ILO. Convention No.182 (9)

of Southeast Asian Nations—. The ASEAN is essentially a geo-political and economic organization that was formed in 1967 by Indonesia, Malaysia, the Philippines, Singapore and Thailand.<sup>66</sup> Nowadays, the ASEAN counts on 10 country members located in the Southeast Asian region. Taking into consideration that the ASEAN is not primarily conceived as a human rights association, it has been along the recent decades that human rights have gained a space in the regional agenda of this instance.

In this sense, the following chapter will outline the most relevant documents adopted by the country members of the ASEAN in relation to child rights. Likewise, it will point out the bodies within the ASEAN that have mandate to protect and promote child rights.

### 2.2.1 Declaration on the Commitments for Children in ASEAN (2001)

This document reaffirms the commitment of the ASEAN towards the promotion of children rights as well as an uplifting of the conditions of minors. It is adopted within the aim of guaranteeing the ASEAN's commitment to *“create opportunities for children to express their views, advocate their rights and participate in development”*.<sup>67</sup> Particularly, this declaration calls governments to protect children from *all forms “of violence, abuse, neglect, trafficking and exploitation”*<sup>68</sup> in all spheres of their development.

Besides the explicit priority that the Declaration gives to children, it goes further by suggesting actions toward structural issues, as a way to counteract their effect on children. In this order, Article 8 suggests to *“create employment opportunities for adult family members in ASEAN countries, as stable families are the key to the social, physical and emotional development of children”*.<sup>69</sup> Although the Declaration does not represent a binding provision for states, its adoption was an open window to bring the attention on the issues faced by Southeast Asian children.

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<sup>66</sup> ASEAN. Organizational Overview. Available at: <http://www.asean.org/asean/about-asean/overview> [Accessed 8 March, 2014]

<sup>67</sup> ASEAN. Declaration on the Commitments for Children in ASEAN. Article 6.

<sup>68</sup> Ibid. Article 15

<sup>69</sup> Ibid. Article 8

### 2.2.2 ASEAN Intergovernmental Commission on Human Rights (AICHR)

The AICHR was inaugurated in 2009 as a consultative body that is an integral part of the ASEAN structure.<sup>70</sup> One of its primary mandates is “*to protect and promote human rights and fundamental freedoms among country members of the ASEAN*”.<sup>71</sup> Similarly, the AICHR was also formed under the function to help enhance public awareness of human rights among the peoples of ASEAN through education, research and dissemination of information. Unlike the declarations previously described, this body encourages ASEAN member states to ratify international human rights instruments.

As part of its purposes, the AICHR was formed to “*uphold the right of peoples of ASEAN to live in peace, dignity and prosperity*”.<sup>72</sup> In this sense, all the measures taken by states are expected to promote human rights within the regional context, “*bearing in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds, and taking into account the balance between rights and responsibilities*”.<sup>73</sup> Besides the purposes, the AICHR also includes a list of principles that shall guide the actions of the states parties.

Most of these principles are in line with the principles of the concept known as the “ASEAN way”. The ASEAN Way rather than an official concept it is the term that describes a set of principles and rules upon which governments of the region act accordingly.<sup>74</sup> In other words, the ASEAN way represents the features of states’ behavior within ASEAN; it includes decision-making, as well as functioning of the ASEAN bodies. In this sense, the components of the ASEAN Way may be summarized as follows: non-interference in the domestic affairs of member states; a preference for informality; decision

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<sup>70</sup> Child Rights Coalition Asia. ASEAN and Child Rights. Available at: <http://childrightscoalitionasia.org/asean-and-child-rights/> [Accessed 8 March, 2014]

<sup>71</sup> ASEAN. AICHR. Article 1.1

<sup>72</sup> Ibid. Article 1.2

<sup>73</sup> Ibid. Article 1.4

<sup>74</sup> Acharya, 2009:76

by consensus; and consultation.<sup>75</sup> Under this framework, the AICHR is expected to act promoting:

- “a) Respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States.*
- b) Non-interference in the internal affairs of ASEAN Member States.*
- c) Respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion. (...)”.*<sup>76</sup>

Together with the principles, the AICHR was created with a mandate that specifically includes the adoption of the ASEAN Human Rights Declaration with a view of “*establishing a framework for human rights cooperation through various ASEAN conventions and other instruments dealing with human rights*”.<sup>77</sup> The aim to articulate the existing documents on the ASEAN states’ willingness with a more specific provision on human rights has made the AICHR the most important body of the Southeast Asian region in relation to the defense of human rights.

### 2.2.3 The Hanoi Declaration on the Enhancement of Welfare and Development of ASEAN Women and Children (2010), and The ASEAN Commission for the Protection and Promotion of the Rights of Women and Children (ACWC)

The Declaration on the Commitments for Children in the ASEAN was a starter to the regional willingness to continue working on child protection as a priority aspect in the agenda. Compare to previous attempts to establish concrete bodies to address issues related to women and children, the Hanoi Declaration strengthens ASEAN’s commitment to ensure that women and children fully benefit from the process of integration and community building that was taking place in the region. With special attention, the Hanoi Declaration

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<sup>75</sup> OHCHR. Background on ASEAN. Available at: [http://bangkok.ohchr.org/files/Regional\\_Dialogue\\_ASEAN\\_Background\\_Paper.pdf](http://bangkok.ohchr.org/files/Regional_Dialogue_ASEAN_Background_Paper.pdf) [Accessed: April 20, 2014]

<sup>76</sup> ASEAN. AICHR. Article 2.1

<sup>77</sup> Ibid. Article 4.2

called for the establishment of the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) and the ASEAN Children's Forum (ACF).

Out of the 21 Articles included in the Hanoi Declaration, three are the ones directly addressing states' responsibility to carry out actions in favor of child rights. The first one is the Article 4, which calls for the strengthen of institutional mechanisms and "*child-centered approach*"<sup>78</sup> in planning, programming and budgeting, implementation, monitoring and evaluation processes at all levels in the region. Following the *child-centered approach*, the Ha Noi Declaration points out in the Article 16 the need to achieve the goals for children in the ASEAN region as regards the child's rights to survival, protection, development and participation in a "*comprehensive and systematic way*".<sup>79</sup> The idea of unpacking the goals in a comprehensive way lies on the organizational aim to promote child participation in the ASEAN Community through the establishment of the ASEAN Children's Forum and other relevant programmes or activities.<sup>80</sup>

The ACWC was established in 2010 with the mandate to "*promote and protect human rights and fundamental freedoms of the women and children of ASEAN*".<sup>81</sup> By promoting the institutionalization of child participation, the ACWC aims to be a supplementary body rather than a duplicated body of the CRC committees. In this sense, the ACWC is called to "*build capacities of relevant stakeholders at all levels, through the provision of technical assistance, training and workshops, towards the realization of the rights of women and children*".<sup>82</sup> Likewise, the Commission is responsible to provide assistance to member states in resolving issues and improving the situation of children.

Nevertheless, together with the monitoring process, as well as the reporting process assistance, the promotion expected from the ACWC lies on the evidences of the situation of

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<sup>78</sup> ASEAN. Ha Noi Declaration on the Enhancement of Welfare and Development of ASEAN Women and Children. Article 4.

<sup>79</sup> Ibid. Article 16

<sup>80</sup> Ibid. Article 10

<sup>81</sup> ASEAN. TOR ACWC. Article 2.1

<sup>82</sup> Ibid. 5.5



children and women. According to the mandate, the collection of these evidences shall emerge from the “*promotion of studies and research related to the situation with the view to fostering effective implementation of the rights of women and children in the region*”.<sup>83</sup> Despite the relevant role that ASEAN gives to the ACWC, the terms of reference of the Commission is clear in recognizing that the primary responsibility to promote and protect human rights rests with each member state.<sup>84</sup>

## 2.3 Child Rights in the Thai Law

In Thailand prostitution was made illegal in 1928, and the laws against it strengthened in 1960. Despite its illegal status, prostitution is an omnipresent part of the Thai society, tacitly accepted and tolerated. Prostitution goes on in brothels in the countryside, behind the garish signs over Bangkok's girlie bars and massage parlors. The industry is estimated to account for an estimated 3 percent of Thailand's economy, or about US\$4.3 billion a year.<sup>85</sup> It was not until the 90's that domestic laws to promote child protection were enacted. Thus, in 1996 first steps took place with the vision to decrease the unstoppable rate of children involved in sexual exploitation in the country.<sup>86</sup>

Besides the ratification of international treaties to address the issue of human trafficking, the Thai government has counteract the effects of child trafficking in recent years through two specific legislative acts, as well as through relevant enhancement of bilateral agreements. The following section will outline these measures taken by Thailand towards the elimination of child prostitution as a component of human trafficking.

### 2.3.1 Child Protection Act of 2003

Together with the ratification of international treaties on child rights in the 90's, the Child Protection Act of 2003 represents one of the most concrete efforts of the Thai gov-

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<sup>83</sup> Ibid. 5.9

<sup>84</sup> Ibid. 3.5

<sup>85</sup> Taipei Times. *Thailand holds debate on legalizing prostitution*. Available at: <http://www.taipeitimes.com/News/world/archives/2003/11/28/2003077555> [Accessed 10 March, 2014]

<sup>86</sup> See Prostitution Prevention and Suppression Act. 1996. Available at: <http://www.nocht.m-society.go.th/human-traffic/law/download/la2-5en.pdf>

ernment to actually give a privileged position to children. One of the most significant results of this Act has been the introduction of Child Protection Committees at the provincial level to develop locally-relevant policies for the protection of children.<sup>87</sup> Before the Child Protection Act, the Prevention and Suppression of Prostitution Act (1996)<sup>88</sup> was the closest measure taken by Thailand to address the issue of child exploitation.

Notwithstanding that the Child Protection Act of 2003 does not include the child prostitution within the list of definitions, the article 4 implicitly defines sexual abuse within the category of “torture”, as follows: “*“Torture” means any commission or omission of acts which cause the deprivation of freedom of, or mental or physical harm to, a child; sexual abuses committed against a child; inducement of a child to act or behave in a manner (...) unlawful or immoral, regardless of the child's consent.*”<sup>89</sup> While it is true that not all the cases of child sexual abuse represent prostitution, all cases of prostitution do constitute child sexual abuse.

The Child Protection Act also includes exploitation in the provision, describing acts that represent a major harmful to the development of children. In this sense, the Article 26 (5) provides that regardless of a child's consent, a person is forbidden to “*force, threaten, induce, encourage, consent to, (...) act in any way that results in the exploitation of a child*”.<sup>90</sup> In the same line, the Article 26 (6) prevents the “*use, employ or ask a child to work or act in such a way that might be physically or mentally harmful to the child, affect the child's growth or hinder the child's development*”.<sup>91</sup> Under any of these perspective child prostitution represents a harmful and traumatic practice for a child, but more importantly, qualifies as exploitation regardless of child’s consent.

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<sup>87</sup> UNICEF. Child Protection, Thailand. Available at: [http://www.unicef.org/thailand/protection\\_3343.html](http://www.unicef.org/thailand/protection_3343.html) [Accessed 10 March, 2014]

<sup>88</sup> See Prevention and Suppression of Prostitution Act (1996). Available at: <http://www.nocht.m-society.go.th/human-traffic/law/download/la2-5en.pdf> [Accessed 10 March, 2014]

<sup>89</sup> Child Protection Act (2003). Article 4

<sup>90</sup> Ibid. Article 26 (5)

<sup>91</sup> Ibid. Article 26 (6)

According to the content of the Child Protection Act, the most explicit provision regarding sexual exploitation is in the Article 26 (9), which states that *“force, threaten, use, induce, instigate, encourage or allow a child to perform or act in a pornographic manner, regardless of whether the intention is to obtain remuneration or anything else”*<sup>92</sup> constitute a crime. Although the meaning of child pornography and child prostitution is not the same – as will be explained in Chapter 3–, the implication of act in a “pornographic manner” might result in induction to child prostitution. Besides the specific provisions dealing with child exploitation, the Child Protection Act also includes a definition of “child at risk of wrongdoing”. According to the provision, it means *“a child who is engaged in occupational activities, or in the accompany of persons, that appear likely to induce such child into committing unlawful or immoral acts; or a child who is in the environment detrimental to such child”*.<sup>93</sup> Although the definition of “immoral acts” remains unclear, the fact that the provision includes a notion of children at risk is an outstanding aspect for the prevention and protection of child exploitation.

### 2.3.2 Anti-trafficking in person Act of 2008

Despite the Child Protection Act aimed to promote the protection of children, it could not cover all the issues that children faced in Thailand, included trafficking. As described, the Protection Act did not make explicit the criminalization of the practice of trafficking. The closest relation to it was the definition of torture and the inclusion of exploitation within the text of the provision. The Article 78, for instance, also considers the penalties for acts within the framework of the Article 26, but imprisonment up to three months does not sound proportional to the harm caused towards a child victim of exploitation.<sup>94</sup> For this reason, in domestic terms, it was not until the Anti-trafficking Act of 2008 that Thailand put magnifying glass to the issue of child trafficking with the need of a holistic approach to victimhood.

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<sup>92</sup> Ibid. Article 26 (9)

<sup>93</sup> Child Protection Act (2003). Article 4

<sup>94</sup> Ibid. Article 78

The Anti-trafficking in Person Act (2008) is not exclusively applicable for children and women. Unlike previous legislative measures taken to prevent human trafficking, the anti-trafficking in Person Act of 2008 applies also for men. For the purpose of this study, the approach to the anti-trafficking Act will be focus on child protection. In this sense, the Act starts with the definition of exploitation, which means “*seeking benefits from the prostitution, production or distribution of pornographic materials, other forms of sexual exploitation, slavery, (...) regardless of such person’s consent*”.<sup>95</sup> The provision defines as a child any person under eighteen years old, which is established in accordance to the CRC standards. The provision is composed by six chapters divided as follows: the general content of the provision, the anti-trafficking in persons Committee, the powers and duties of the competent official, the provisions of assistance and protection of safety to the trafficked person, the anti-trafficking in persons Fund, and the Penalties for traffickers. Unlike other initiatives to combat human trafficking<sup>96</sup>, the Anti-trafficking in persons Act of 2008 incorporates levels of legislation, protection, prevention and remedy.

In terms of exploitation, the scope of the provision establishes that any individual “*procuring, buying, selling, vending, bringing from or sending to, detaining or confining, harboring, or receiving a child; is guilty of trafficking in persons*”.<sup>97</sup> Therefore, whoever commits any act of supporting, contributing property, accepting a property, inducing, suggesting or contacting a person to become a member of the organized criminal group shall be punished as the offender of an offence of trafficking in persons.<sup>98</sup> The provision also takes into consideration the liability of governmental officials when acting unlawful towards the protection of victims. In order to make feasible the implementation of the provision, it clearly requires the establishment of Anti-trafficking in Persons Committee (ATP Committee). This committee has the power to make recommendations, preventive strategies, guidelines,

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<sup>95</sup> Anti-trafficking in Persons Act (2008). Section 4

<sup>96</sup> See the Prevention and Suppression of Trafficking in Women and Children Act B.E. 2540 (1997)

<sup>97</sup> Anti-trafficking in Persons Act (2008). Section 6 (2)

<sup>98</sup> Ibid. Section 7

monitoring, research supervision, and to issue regulations that will help the cabinet to guarantee the effective suppression of trafficking in persons.<sup>99</sup>

Besides the ATP Committee –that is mainly conformed by Ministers and experts–, the implementation of the provision lies on the Coordinating and Monitoring of Anti-trafficking in Persons Performance Committee (CMP Committee). Such committee consists in a multi-level instance that gathers together representatives from the main ministries, as well as the tourist industry, and the Royal Thai Police. With more concrete goals, the CMP Committee is expected to carry out monitoring processes, as well as advocacy campaigns in order to raise awareness on the issue of human trafficking.<sup>100</sup> The Anti-trafficking Act also dedicates a chapter to the powers and duties of the “competent official” who provides assistance to the trafficked person. In this sense, the “Competent Official” means a “*superior administrative or police official including a government official (...) appointed by the Minister (...)*”<sup>101</sup> to perform the duty under the provision. Assertively, the provision describes in detail the role of the competent official, and the procedures that need to be taken when assisting a victim of human trafficking.

In terms of protection, the Anti-trafficking in Persons Act of 2008 stresses on the recognition of immigration as a contributing aspect of human trafficking. For that reason, Sections 37 and 38 point out the conditions under which an alien victim must be treated within the Thai borders. Assistance shall be provided, as well as medical treatment, rehabilitation, among others.<sup>102</sup> Likewise, it establishes that when it comes to return the victim to his/her national country, the security and welfare of such person shall be taken into consideration. In regard to remedy, the provision is clear in the need to establish an “Anti-trafficking in Persons Fund” to be used *as capital for the prevention and suppression of trafficking in persons*.<sup>103</sup> Therefore, the money shall be used for purposes of assistance to the trafficked

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<sup>99</sup> Ibid. Section 16

<sup>100</sup> Anti-trafficking in Persons Act (2008). Section 23

<sup>101</sup> Ibid. Section 4

<sup>102</sup> Ibid. Section 37, 38

<sup>103</sup> Ibid. Section 42

person, protection providing, preventing and suppressing of trafficking in persons, among others.<sup>104</sup>

In addition, the Anti-trafficking Act of 2008 also includes a chapter on Penalties, which aims to apply more strict punishment to the persons involved in human trafficking. In this sense, whereas previous initiatives such as the Child Protection Act of 2003 used to give penalties up to three months for charges of sexual abuse, the Anti-trafficking in Persons Act of 2008 gives liability from four years up to ten years of imprisonment and a fine from eighty thousand Baht to two hundred thousand Baht to whoever commits an offence of trafficking in persons.<sup>105</sup> Furthermore, the provision also determines liability in accordance to the age of the victim that has been inducted to trafficking. Thus, *“if the offence is committed against a child whose age exceeds fifteen years but not yet reaching eighteen years, the offender shall be liable to the punishment of an imprisonment from six years to twelve years and a fine from one hundred twenty thousand Baht to two hundred forty thousand Baht”*.<sup>106</sup> Similarly, if the offence is committed against *“a child not over fifteen years of age, the offender shall be liable to the punishment of an imprisonment from eight years to fifteen years and a fine from one hundred sixty thousand Baht to three hundred thousand Baht”*.<sup>107</sup> Although the reasons to establish such distinction might be not clear enough when exploitation at any age should be equally repudiated, the implications of the age in the sex industry does mark an exceptional feature of the market. Chapter 3 will further develop it. Meanwhile, the judicial clarity that the Anti-trafficking Act provides to address the issue of human trafficking –and child prostitution– results useful for the understanding of effective protection of victims.

Besides, it does not only give liability to the individuals directly involved in the trafficking business, but it also do so to those that *“obstructs the process of investigation, inquiry, prosecution or criminal proceedings on the offence of trafficking in persons so that the*

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<sup>104</sup> Ibid. Section 44

<sup>105</sup> Anti-trafficking Act (2008). Section 52

<sup>106</sup> Ibid.

<sup>107</sup> Ibid.

*process is unable to be conducted in a well-manner (...)*<sup>108</sup> Such kinds of guidelines undoubtedly help in counteracting corruption, another key issue in dealing with child prostitution.

### 2.3.3 Bilateral and multilateral agreements for the suppression of trafficking in persons

So far, it has been outlined the domestic measures taken by the Thai government towards the suppression and prevention of child prostitution within the framework of human trafficking. As part of the strategy, the government has also work in the line of international cooperation, as the OPSC suggests, in order counteracting the effects of child trafficking. Knowing that Thailand represents a departure, destination, and transit country for human trafficking, it is important to join efforts with neighbor countries in order to prevent the impacts of the traffic of persons. In the case of Thailand, the government has managed to establish bilateral agreements with the governments of Cambodia, Myanmar, and Vietnam. Additionally, in 2004, a multilateral memorandum was agreed with the governments of Cambodia, Myanmar, Lao, China, and Vietnam towards regional cooperation for the suppression of human trafficking.

The bilateral agreements are mostly in terms of prevention, protection, and reintegration of the victims –including the possibility of repatriation–. However, they also include the cooperative actions towards the role of borders’ authorities in regards to human trafficking. In essence, all the bilateral agreements recognize the structural causes that play as contributing factors for human trafficking. For this reason, the preventive measures agreed on the bilateral cooperation are focus on *minimizing vulnerability and promoting safe migration*.<sup>109</sup> Although the migration is a key element in analyzing human trafficking, for the matter of victims’ protection, the bilateral agreements also make emphases on the fact that *trafficked women and children shall be considered victims, not violators or offenders of the*

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<sup>108</sup> Ibid. Section 54

<sup>109</sup> Memorandum of Understanding between the government of Thailand and the government of Myanmar on cooperation to combat trafficking in persons, especially women and children. Article 4

*immigration law*.<sup>110</sup> The problem of re-victimization is one of the factors that have an impact in the prosecution of traffickers, due to the victims fear to become the victimizer at the end of the process. The bilateral agreements also include the reintegration of the victims in a sense of *freedom, self-esteem, and human dignity*.<sup>111</sup> By doing so, the victims should not only being guaranteed of their right to repatriation, but they should also be provided with integral assistance in order to return to their community and families without being subject of any kind of stigmatization and/or discrimination.

In regional terms, the multilateral agreement that was joined by the governments of Cambodia, Myanmar, Lao, China, and Vietnam represents a cross-border commitment towards the legislative, preventive, and protective actions that are needed for the suppression of human trafficking. The content of the multilateral agreement is quite similar to the provisions included in the bilateral agreements. However, one of the main features is the joint work of diverse political regimes towards the protection of human dignity. This particular aspect is an exceptional step for governments that do not prioritize human rights in their political agenda.

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<sup>110</sup> Memorandum of Understanding between the government of Thailand and the government of Vietnam on cooperation to combat trafficking in persons, especially women and children. Article 6

<sup>111</sup> Memorandum of Understanding between the government of Thailand and the government of Cambodia on cooperation to combat trafficking in persons, especially women and children. Article 18



### **3 WHAT IS BEHIND THE INEFFICIENCY OF THE THAI GOVERNMENT IN ELIMINATING CHILD PROSTITUTION?**

So far, the study has concentrated on describing the international, regional, and domestic legal instruments that address the issue of child prostitution. At all levels, there seems to be a progressive approach to the problem through the enacting of provisions that aim to give precise guidelines, as well as more inter-agency cooperation in action. Nevertheless, the law as such has little sense without implementation. Many questions arise on how the theory is brought into practice, the limitations on the scope of the legal instruments when social and political conventions take place, as well as the extent to which the governments are actually capable of suppressing child prostitution.

Since this study takes as exemplifying case the country of Thailand, the following analysis of implementation will take the Southeast Asian country as the central context. In this sense, the present chapter provides a critical approach to the legal instruments that were previously described, and aims to determine from a human rights perspective the factors that may explain the inefficiency of the Thai government in the elimination of child prostitution.

#### **3.1 Domestic implementation and the lack of enforcement**

Like other popular red-light districts in Bangkok –such as the Nana Entertainment Plaza– the sex industry in Patpong looks anything but hidden. Although legal provisions such as the Entertainment Places Act of B.E. 2509 (1966) contains regulations for the establishments classified under “entertainment places”,<sup>112</sup> given the close relationship of many of these businesses to the sex industry, the differences between massage parlors and go-go bars and prostitution establishments are not necessarily clear.<sup>113</sup> Although areas such as Patpong are officially classified into the category of “entertainment places”, many of them

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<sup>112</sup> Included that “employees” are required to be at least 18 years old

<sup>113</sup> Fox, J. “Sex laws in Thailand”. Thailand Law Forum. Available at: <http://www.thailawforum.com/sex-crimes-in-thailand-part2-2.html> [Accessed: March 20, 2014]

are especially known as the most popular prostitution venues.<sup>114</sup> Prostitution is technically illegal in Thailand; however, as Mrs. Chantrakul argues, sexual services are openly sold with an estimated number of 60.000 children below 18 years old involved in prostitution.<sup>115</sup> Since the regulatory provisions for entertainment places is not clear enough in the sanctions for businesses that incur in child prostitution, in many cases entertainment venues are used as front for prostitution and sex trafficking, in addition to other types of “fronts” –such as “massage parlors”, “curtain hotels”, and even restaurants–.

When it comes to prevention and protection of children victims of child prostitution, it is important not only to look at the existing legal frameworks, but also to look at its effective implementation. According to the Legal Programme Officer of ECPAT International, the Philippines represents a good example of a country with all legal frameworks in place, but with enormous failures in terms of implementation.<sup>116</sup> As previously described, also Thailand has put much work in improved the domestic legal frameworks that handle child prostitution. However, questions arise when one analyzes the extent to which such investment is mirrored in reality and whether laws are efficiently –and equally– enforced. For instance, as stated by Mrs. Keophaithool, although there are several laws, in practice it is difficult to see a functional system able to effectively protect children.<sup>117</sup>

The domestic implementation for the elimination of child prostitution in Thailand has mainly come through the enacting of provisions such as the Child Protection Act of 2003, and the Anti-trafficking in Persons Act of 2008 –previously presented in Chapter 2–. The former, although aiming to criminalizing child abuse and exploitation, has turned out to be too vague to deal with child prostitution as one of the worst forms of child exploitation. In order to criminalize an action it is necessary to define what the crime is. In this sense, the fact that the Child Protection Act does not include an explicit definition of child prostitution opens an important gap when prosecutors claim justice for children. Besides, the use

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<sup>114</sup> Interview East-Asia Programme Associate of Forum-Asia. Kuan: 2013

<sup>115</sup> Interview Project Coordinator ECPAT Foundation. Chantrakul:2013

<sup>116</sup> Interview Legal Programme Officer ECPAT International. Souchet: 2013

<sup>117</sup> Interview Child Rights/Protection/Gender Advisor Plan International Thailand Foundation. Keophaithool: 2014

of terms like “*wrongdoing*” behaviors or “*immoral*” acts has proved to be far too subjective for the definition of child prostitution as a crime. What may represent an immoral act for some people does not necessarily mean the same under other’s criteria. But the Laws need to be explicit enough if they are meant to provide justice for those whose rights have been violated. Furthermore, although any act of child abuse is unacceptable, the Child Protection Act included sanctions that, particularly in the case of children subject of trafficking, became disproportional to the great damage caused to the victims. While the contemplation of children at risk in the Protection Act of 2003 has meant a relevant contribution, the scope for the protection of “*children at risk*” within the framework of the Act remains limited, due to the weak specificity in the legal procedures in terms of prosecution and reparation.

However, the weaknesses of the Child Protection Act of 2003 are not only in terms of the interpretation of the law, but also in terms of the enforcement of it. For instance, the Child Protection Act calls for the establishment of a National Child Protection Committee, which is replicated into the Bangkok Metropolitan Child Protection Committee and the Child Protection Committees at the provincial level. As a “mechanism of implementation”,<sup>118</sup> these committees are mandated to recommend policies, plans, budgets, laws and regulations on new child legislation and to appoint various sub-committees and/or working groups for the promotion of social welfare and safety protection.<sup>119</sup> Nonetheless, when it comes to the practice –as argued by Mrs. Keophaithool–, the reality is that the Child Protection Committees are not even established in all provinces. According to my sources, in some provinces the Committee meets at least once a year, whereas in some others the financial resources have not been even assigned for the functioning of the Committee.<sup>120</sup> Hence, alt-

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<sup>118</sup> See Thai Ministry of Foreign Affairs. Human Rights Thailand. Available at: <http://www.mfa.go.th/humanrights/implementation-of-un-resolutions/78-answer-to-questionnaire-on-the-protection-of-children-from-sexual-exploitation> [Accessed: May 7, 2014]

<sup>119</sup> See Article 7, Child Protection Act of 2003.

<sup>120</sup> Interview Child Rights/Protection/Gender Advisor Plan International Thailand Foundation. Keophaithool: 2014

though in paper the law visualizes the importance of establishing Child Protection Committees all over the country, the enforcement of the law is what remains as a big challenge.

In the case of the Anti-trafficking in Persons Act of 2008, more elements come into play since it is the first domestic provision that have tried to explicitly establish functions and standards for the protection of the victims. However, as argued by Mrs. Chantrakul, the attempts at definitions that the government has put into that Act have worked in the direction of taking a very wide perspective of trafficking, rather than focusing on child prostitution and/or child pornography as such.<sup>121</sup> The following section will illustrate these elements through an analysis of the Thailand's initial report on the OPSC to the Committee on the Rights of the Child.

### 3.1.1 The dichotomy between what has been said and what has been done:

#### Thailand's initial report on the OPSC and the concluding observations of the Committee on the Rights of the Child

One of the factors that may explain the inefficiency of the Thai government in the elimination of child prostitution is the lack of enforcement of existing legal frameworks, as well as the legal gaps that remain in the enacted provisions. One might wonder how to measure the "efficiency" of a state in regard to the elimination of child prostitution. For the purpose of this research, "efficiency" is measured in accordance with the aspects that the Committee on the Rights of the Child has assessed in relation to the implementation of the OPSC, namely: Data; General measures of implementation (Legislation, National Plan of Action, Coordination); Prevention (Child sex tourism); Protection (Impunity, Jurisdiction and extradition), and International assistance and cooperation.

Thailand's initial report on the OPSC was positively valued as regards the implementation of the Anti-trafficking in Persons Act of 2008. While the Anti-trafficking in Persons Act gives response to critical aspects of human trafficking, the Committee has made relevant comments and recommendations on both the nature and content of the provision. It is nec-

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<sup>121</sup> Interview Project Coordinator ECPAT Foundation. Chantrakul:2013

essary to clarify that the gaps identified in this section respond to the content of the Thai state report to the Committee on the Rights of the Child, which does not mean that they constitute *all* the breaches regarding the issue.

Starting with the definitions, in terms of legislation –due to the wide target covered– the Anti-trafficking in persons Act lacks definition of the child, as well as precise definition of offences related to the content of the OPSC, namely: *sale of children, child prostitution and child pornography*. In other words, although pertinent that the Thai government has included in the Section 6 of the Anti-trafficking Act crimes against children that are covered by the provision, it does not break down the specific types of child trafficking included in the OPSC. As the Committee remarks, it was important to cover “trafficking”, but the State should be able to prosecute perpetrators of other offences and needs clear definitions to be able to do so.<sup>122</sup> In the line with the view of ECPAT Foundation, this is one of the main weaknesses of the law, considering that the vulnerability of children cannot be compared with the vulnerability of adults. Hence, children need both be provided with special protection, as well as with special policies differentiated from adults’.<sup>123</sup> This observation is also reflected in the inadequate and limited scope of the National Plan of Action Against Trafficking<sup>124</sup> formulated by the government. In this case, child prostitution and child pornography –both offences related to the OPSC– are not explicitly covered by the plan, but rather are under the umbrella of human trafficking.

The Committee also directs attention to the lack of information about the outcome of the evaluation of projects implemented under the 2005-2010 Plan.<sup>125</sup> Following my fieldwork, there is not reliable monitoring mechanism to measure the impact of ongoing projects. In many cases, as Mrs. Keophaithool claims, even if the budget is assigned the problem is

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<sup>122</sup> Committee on the Rights of the Child. Concluding observations: Thailand. Paragraph 9.

<sup>123</sup> Interview Project Coordinator ECPAT Foundation. Chantakul:2013

<sup>124</sup> See Thailand’s Anti-Human Trafficking Action Plan 2012 – 2013 Available at: <http://www.nocht.m-society.go.th/album/download/b1a47ea88fdf25793b82c440b4d88f29.pdf> [Accessed: March 31, 2014]

<sup>125</sup> Committee on the Rights of the Child. Concluding observations: Thailand. Paragraph 11.

that there are not indicators to measure the impacts.<sup>126</sup> Whereas the state's report highlights the training received by officials to provide assistance to victims, the Committee regrets the lack of evaluation record available to measure the progress.<sup>127</sup> In this sense, the extent of improvement that could be done in projects to overcome child prostitution is limited because of the lack of best practices or lessons learned from those that have been already implemented.

When it comes to preventive measures, though Section 16 of the Anti-trafficking Act stresses on the measures that should be taken in order to promote the suppression of trafficking in persons, existing laws, social policies and programmes of the State are insufficient and do not adequately prevent children from becoming victims of the offences included in the OPSC.<sup>128</sup> According to ECPAT Foundation, the prevalence of tourism coupled with poverty is an additional underlying social factor that contributes to the vulnerability of children to sexual exploitation in the travel and tourism sector.<sup>129</sup> While Thailand continues to be an attractive tourist destination, the internal situation of poverty –especially in rural areas– intensifies the vulnerability of children to be sexually exploited in the tourism industry. In this regard, although the State has made efforts to translate into Thai the international provisions that protect children from exploitation as an strategy for awareness-raising, the lack of adequate legislative and administrative procedures and social policies to prevent child sex tourism is a constant concern.<sup>130</sup> A regulatory framework and cooperation should exist –and be implemented– in partnership with the tourism industry in order to be effective and ensure that the protection of children prevails over any monetary interest.

Regarding protection, despite the state's efforts to define the powers and duties of the *competent official* that is supposed to assist victims –as well as the establishment of new penalties for offenders–, many concerns remain. For instance, Thai legislation does not explicitly

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<sup>126</sup> Interview Child Rights/Protection/Gender Advisor Plan International Thailand Foundation. Ke-  
ophaithool: 2014

<sup>127</sup> Ibid. Paragraph 17.

<sup>128</sup> Committee on the Rights of the Child. Concluding observations: Thailand. Paragraph 21.

<sup>129</sup> Interview Project Coordinator ECPAT Foundation. Chantakul:2013

<sup>130</sup> Committee on the Rights of the Child. Concluding observations: Thailand. Paragraph 23.

allow extraterritorial jurisdiction for all the cases referred as offences in the Article 4 of the OPSC. In this sense, in the extradition agreements that have been established with 14 countries, the OPSC is not even invoked as legal basis for the procedure; but more importantly, extradition is subject to the existence of a treaty between Thailand and the requesting country.<sup>131</sup> The lack of extraterritorial jurisdiction is a serious concern in terms of impunity, but its practical implications will be illustrated in Section 3.3. Although the state has provided assistance to almost 10.000 children in 2011,<sup>132</sup> the migrant victims have not been adequately assisted, and their protection has been also at expenses of the re-victimization during prosecution of offenders.<sup>133</sup> This is the case of the self-witness requirement to prosecute traffickers. According to the youth activist 2, children victims of commercial sexual exploitation are not willing to testify in trials –or even denounce to the police– because they know that once their identity is revealed in front of the offender, they will be at risk to be targeted either by the offender after serving the penalty, or by any other member of the trafficking network.<sup>134</sup> Table 1 helps to illustrate the number of child victims (under 18 years old) of child labour and the number of those who received assistance from the Ministry of Social Development and Human Security (MSDHS) during the period between 2009-2011.

**Table 1:**

Category	2009		2010		2011	
	Total number	Financial Aid	Total	Financial Aid	Total	Financial Aid
<b>Forced Labour</b>	<b>62</b>	<b>-</b>	<b>14</b>	<b>1</b>	<b>16</b>	<b>3</b>
Forced Prostitution/Pornography	80	-	98	-	60	60

*Source:* Ministry of Social Development and Human Security, Department of Social Development and Welfare. “Thailand’s initial report on the OPSC, 59th Session of the Committee on the Rights of the Child”

<sup>131</sup> Ibid. Paragraph 29.

<sup>132</sup> United Nations. Thailand’s initial report on the OPSC. 59th Session of the Committee on the Rights of the Child. Available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fOPSC%2fTHA%2fQ%2f1%2fAdd.1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fOPSC%2fTHA%2fQ%2f1%2fAdd.1&Lang=en) [Accessed: March 31, 2014]

<sup>133</sup> Committee on the Rights of the Child. Concluding observations: Thailand. Paragraph 31.

<sup>134</sup> Interview with Youth Activist 2, Chiang Rai: 2013

As shown in the table 1, child prostitution is classified in the same category as child pornography. While both are forms of child exploitation, they do not constitute the same kind of crime. The strategies of trafficking, the forms of abuse, and the implications in terms of migration vary between child prostitution and child pornography. Therefore, the differentiation of these crimes at both legal and political levels is crucial, so the assistance and prevention to victims are coherent with their needs. According to the data, the progressive number of victims receiving assistance suffered a variation from 2010 to 2011, though the number of victims that received financial aid as part of remedy measures has drastically increased from zero in 2009 and 2010 to 60/60 in 2011. The fluctuation in assistance levels can be explained either through an actual decrease of child prostitution and child pornography by 2011, or it might rather be the result of the limited scope of assistance offered by the government.

During my fieldwork I found that there is no official data regarding child prostitution in Thailand besides the content of table 1. Whereas NGOs such as ECPAT Foundation estimate that approximate 60.000 children under 18 years are involved in prostitution –and ECPAT assists up to 3.000 children at risk per year–<sup>135</sup>, the MSDHS reports providing assistance only up to 98 victims annually. If 98 is the number of victims assisted it means that 98 is the threshold of potential cases to bring to court. Such incongruent information is not only alarming as regards the question of impunity; it is also a strong indication of widespread lack of coordination between state agencies. In Thailand, policies on child rights and their practical implementation are assigned to different agencies within the MSDHS, and there is no overall coordination mechanism responsible for organizing the activities of all relevant State and non-State agencies to protect children of sexual exploitation.<sup>136</sup> Besides, the lack of information on clear budget allocations to carry out the measures that need to be taken in accordance to the OPSC represents a threat to the reestablishment of the rights of the victims,<sup>137</sup> considering the cost of having a protection system as well as the cost of tri-

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<sup>135</sup> Interview Project Coordinator ECPAT Foundation. Chantrakul:2013

<sup>136</sup> Committee on the Rights of the Child. Concluding observations: Thailand. Paragraph 13.

<sup>137</sup> Ibid. Paragraph 19.



als and prosecutions. Indeed, my sources indicate that it is the lack of clear budget allocations what makes the functioning of Child Protection Committees difficult.<sup>138</sup> Hence, fewer are the possibilities to have a strong and coordinated network for assistance to the victims.

### 3.1.2 Legal gaps on effective prosecution

Thailand is a country of destination, transit and departure for human trafficking.<sup>139</sup> For this reason, the existing laws should be clear enough in order to establish liability of pimps, businesses, and individuals involved in exploitation. Whereas the Anti-trafficking Act in Persons of 2008 criminalizes the “*buying and selling (...)*”<sup>140</sup> of a child, the protection of victims has encountered important obstacles in regard to justice and prosecution. The absence of legal distinction between the different kind of perpetrators<sup>141</sup> that should be liable for child prostitution, is just one of the legal gaps on effective prosecution that requires attention as an important step for closure and reintegration of the victims. Although the Anti-trafficking in Persons Act includes a general target of individuals that may be incurring in human trafficking, the network through which child sexual trafficking occurs needs to be explicitly outlined in order to guarantee justice for victims.

Indeed, there are several cases of victims being mistreated by law enforcement agencies who perceive them as criminals or violators of Thailand’s immigration law.<sup>142</sup> In this sense, the problem of re-victimization, in which victims’ privacy and identity are not effectively protected during trials and testimonies play against the prosecution of traffickers in Thailand.<sup>143</sup> Table 2 shows the number of human-trafficking prosecution cases under the Plan on the Protection of Children, Youth and Women, and Anti-Human Trafficking during the period between 2010 (January-December) and 2011 (January-October).

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<sup>138</sup> Interview Child Rights/Protection/Gender Advisor Plan International Thailand Foundation. Ke-  
ophaithool: 2014

<sup>139</sup> ILO, 2005:15

<sup>140</sup> Anti-trafficking in Persons Act (2008). Section 6(2)

<sup>141</sup> For instance, legal definition and distinction between the pimp, the owner of the establishment, the adult who has custody of the victim, the client, etc.

<sup>142</sup> Ninsry, 2008:339

<sup>143</sup> Ibid.

**Table 2:**

		Victims (Persons)										Alleged Offenders (Persons)					
Year (Month)	Reported cases	Sex		Age (-18 years old)				Total	Sex		Age (-18 years old)				Total	Arrest	Issuance of arrest warrants
				0	13	15	0				13	15					
		Male	Female	-	-	-	Male	Female	-	-	-						
2010 (January - December)	56	40	14	1	0	0	1	31	33	2	0	1	3	16	4		
2011 (January - October)	67	52	16	7	0	3	10	44	47	3	0	0	3	44	19		
<b>Total</b>	123	92	30	8	0	3	11	75	80	5	0	1	6	60	23		

Source: Royal Thai Police, Strategy Division. Department of Social Development and Welfare. "Thailand's initial report on the OPSC 59th Session of the Committee on the Rights of the Child"

Unlike Table 1, Table 2 does not detail child trafficking prosecutions, but cases of human trafficking in general. According to the Table 2, the number of prosecutions in 2011 increased in comparison to the previous year. Nonetheless, the number of reported cases do not detail the type of child labour that victims were exposed to. It means that out of the 67 prosecution cases that were conducted in 2011, there is no data on the number of cases directly related to the issue of child prostitution. In 2013, the Thai government reported investigating 305 trafficking-related cases that were executed in 2012. It certainly was an increase from 67 in 2011; however, similar to previous years, it did not provide sufficient information to determine how many of these cases actually constituted trafficking.<sup>144</sup> According to the United States Department of State, *2013 Trafficking in Persons Report*, despite the increase in potential investigations, the number of prosecutions significantly decreased from 67 in 2011 to only 27 in 2012; besides, the government reported having convicted 10 offenders in four trafficking-related cases, compared with 12 convicted in 2011.<sup>145</sup> While concerns remain in relation to the high level of impunity, my fieldwork

<sup>144</sup> UNHCR Refworld. 2013 Trafficking in Persons Report – Thailand. Available at: <http://www.refworld.org/docid/51c2f3824d.html> [Accessed: April 10, 2014]

<sup>145</sup> United States Department of State, *2013 Trafficking in Persons Report – Thailand*. Available at: <http://www.refworld.org/docid/51c2f3824d.html> [accessed 18 April 2014]

suggests that another reason that may explain the reduction in prosecution is that in many cases of child protection, either mediation takes place, or sometimes corruption is involved by providing certain amount of money to the victims so the offender is not denounced with the competent authorities.<sup>146</sup> Regardless the scenario, the levels of impunity in Thailand for crimes related to child trafficking remain scandalous.

Now talking about cross-border prosecution, according to the United Nations Office on Drugs and Crime (UNODC), 11 was the number of cases brought to court on charges of human trafficking during the period between 2008-2013. Besides, no Thai citizens were reported arrested abroad for commercial sexual exploitation of children offences between 2007/2008<sup>147</sup>. Only three out of the eleven cases retrieved by UNODC were cases related to child trafficking; mostly related to exploitation for domestic chores, fishing industry, and sexual abuse.<sup>148</sup> Notwithstanding the high prevalence of labour trafficking in Thailand, less than one quarter of investigations involved suspected cases of forced labor. And, despite expert consensus that inspections are not effecting in identifying forced labour, authorities continue prosecution with failed attempts to dismantle trafficking through inspections.<sup>149</sup> Whereas police operations fail in rescuing girls that are exploited by the sex industry, for victims, every single day makes an enormous difference in the atrocities they suffer in brothels –and in all kind of front businesses that are used for trafficking–. As a real example, it is difficult to even imagine that a girl who was rescued after “only” 20 days in a brothel has been already raped up to 198 times.<sup>150</sup>

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<sup>146</sup> Interview Child Rights/Protection/Gender Advisor Plan International Thailand Foundation. Ke-  
ophaithoo: 2014

<sup>147</sup> Child Wise. Travelling Child-Sex Offenders in South East Asia: A Regional Review - 2007/2008. Page 25.

<sup>148</sup> UNODC. Human Trafficking Case Law Database. Available at:  
[http://www.unodc.org/cld/search.aspx?f=en%23caseLaw%40country\\_label\\_s%3aThailand](http://www.unodc.org/cld/search.aspx?f=en%23caseLaw%40country_label_s%3aThailand) [Accessed: April 11, 2014]

<sup>149</sup> United States Department of State, *2013 Trafficking in Persons Report – Thailand*. Available at:  
<http://www.refworld.org/docid/51c2f3824d.html> [accessed 18 April 2014]

<sup>150</sup> The CNN Freedom Project. Every day in Cambodia Documentary. Available at:  
<http://thecnnfreedomproject.blogs.cnn.com/2013/09/25/every-day-in-cambodia/> [Accessed: April 17, 2014]

According to Mrs. Chantrakul, the existence of demand for sex with children and individuals wanting to exploit vulnerable children to make profits has resulted in many children in Thailand being victimized through trafficking for sexual purposes, prostitution and pornography.<sup>151</sup> In this sense, the criminalization of the demand is an additional gap on effective prosecution in Thailand. However, in order to analyze the demand it is important to keep in mind the distinction that Chapter 1 has established between child prostitution and adult prostitution. Unlike adult prostitution, any act of child prostitution is considered as a form of exploitation under international law. Having said that, the starting point of commercial sexual exploitation of children is that commerce will exist as long as there are perpetrators and profitability.<sup>152</sup> Although the perpetrators are often called “buyers”, “clients” or “costumers”, the reality is that such terms alleviate the responsibility from the abuser, the perpetrator, the exploiter, and the criminal.<sup>153</sup>

The terminology matters because, as stated by the youth activist 1, in many cases it happens that children after being abused and returned to their families do not dare denouncing because they were told that the “costumer” has just provided help for them.<sup>154</sup> In addition to it, despite the inclusion of liability for “*whoever*” that incurs in certain actions of trafficking –outlined in Section 54 of the Anti-trafficking Act of 2008–, the penalties described in the Law yet do not criminalize the perpetrator. Thus, if a child is raped under the label of “service”, it does not imply the liability for the real crimes that happens against him/her. In this regard, I would like to use as an example the legislative initiative of countries such as Sweden, Norway and Finland in relation to the criminalization of the demand of sexual commerce.<sup>155</sup>

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<sup>151</sup> Interview Project Coordinator ECPAT Foundation. Chantrakul:2013

<sup>152</sup> Council of Europe. Prostitution, trafficking and modern slavery in Europe. Report Committee on Equality and Non-Discrimination. Rapporteur: Mr. José Mendes Bota, Parliamentary Assembly. March 20, 2014.

<sup>153</sup> Karlén, 2011:109

<sup>154</sup> Interview with Youth Activist 2, Chiang Rai: 2013

<sup>155</sup> Although the legislative Act in these Scandinavian countries has raised great debate since it also involves adult prostitution, for the purpose of this paper, the use of the case aims to show the relevance of criminalizing the demand of sexual commerce, but exclusively in relation to child prostitution.

In 1999, Sweden introduced the Sex Purchase Act, prohibiting and sanctioning the purchase of sexual services but not their sale. Similar legislation was later introduced in Norway (2008) and Iceland (2009).<sup>156</sup> The Sex Purchase Act aimed to curb demand as a way of combating prostitution. As Swedish expert Gunilla Ekberg wrote, one of the main aspects of Swedish policies on prostitution is the focus on the root cause, namely *“the recognition that without men’s demand for and use of women and girls for sexual exploitation, the global prostitution industry would not be able to flourish and expand”*.<sup>157</sup> Although this particular law also applies for voluntary prostitution –which is not the scope of this paper–, the relevance of referring to this initiative lies on the added value that such a legislative initiative to criminalize the demand of sexual commerce would have in the specific case of commercial sexual exploitation of children. What I argue by using this case is the legal viability to criminalize the demand of child prostitution. By doing so, the demand of children for sexual purposes would be significantly reduced, and so would the number of children in risk.

Indeed, my sources suggest that in the Thai sex market, the demand might vary depending on the interest of the “client” to buy sex with a virgin<sup>158</sup> child. It can be either to avoid any kind of STDs, or because a special interest in younger children. Thus, whereas a virgin child might be trafficked for up to 14.400THB (450 USD), a sexual encounter with an “experienced” child might vary around a third of that amount.<sup>159</sup> Following this reality, the Thai Anti-trafficking Act establishes a distinction between penalties for crimes against children above 15 years old (but below 18), and penalties for crimes against children that have not reached 15 years old.<sup>160</sup> Although both are crimes, acts of pedophilia are more likely to be severely punished by the law.

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<sup>156</sup> Ibid.

<sup>157</sup> Ekberg G. The Swedish Law That Prohibits the Purchase of Sexual Services, in Violence Against Women. Available at: <http://www.prostitutionresearch.com/pdf/EkbergVAW.pdf> [Accessed: April 18, 2014]

<sup>158</sup> Although the meaning of “virginity” would vary from one culture to another, what I am referring here is explicitly to the child that has never had coition.

<sup>159</sup> Interview with youth activist 1. Chiang Rai: 2013.

<sup>160</sup> See Chapter 6, Section 52 of the Anti-trafficking in Persons Act of 2008.

As shown so far, the legal gaps in both the implementation and enforcement of domestic laws are relevant contributing factors for the perpetuation of child prostitution in Thailand. With special concern on the wide but restricted scope of the Anti-trafficking in Persons Act of 2008, I argue that child victims of commercial sexual exploitation remain unprotected by the Thai law. However, whereas the need to strengthen the legislative framework is yet to be fulfilled, political factors at both domestic and regional levels threaten the effective suppression of child prostitution.

### 3.1.3 Corruption: the political enemy of the law

Poor implementation of laws and policies, as well as some instances of corruption or official involvement in the exploitation of children remain a problem in Thailand.<sup>161</sup> In certain areas where trafficking is common, police have formed relationships with traffickers, enabling human trafficking to prosper.<sup>162</sup> In this sense, corruption, as a political obstacle for the preservation of the rule of law, remained widespread among Thai law enforcement personnel, creating an enabling environment for human trafficking to prosper.

There are credible reports indicating that corrupt officials protecting brothels, and other sex businesses, have used information from victim testimony to weaken cases, and have even incurred in sexual abuse of children under custody.<sup>163</sup> In fact, according to my sources local officials with commercial interests in prostitution sometimes protect the practice.<sup>164</sup> As youth activist 2 states, in many cases the community does not dare to report at case to the police because the corrupted police officers instead of rescuing victims go and warn the pimps to hide the children.<sup>165</sup> In addition to the corruption of local-level police officers, the *2013 Trafficking in Persons Report* also points out the protective relationships between central-level specialist police officers and the trafficking hot-spot areas to which they were

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<sup>161</sup> Interview Project Coordinator ECPAT Foundation. Chantrakul:2013

<sup>162</sup> ECPAT. Alternative Report Following the Initial Report from Thailand on the implementation of the OPSC. Available at: [http://www2.ohchr.org/english/bodies/crc/docs/ngos/Thailand\\_ECPAT\\_OPSC.pdf](http://www2.ohchr.org/english/bodies/crc/docs/ngos/Thailand_ECPAT_OPSC.pdf) [Access: April 7, 2014]

<sup>163</sup> United States Department of State, *2013 Trafficking in Persons Report - Thailand*, 19 June 2013, available at: <http://www.refworld.org/docid/51c2f3824d.html> [accessed 18 April 2014]

<sup>164</sup> Interview Project Coordinator ECPAT Foundation. Chantrakul:2013

<sup>165</sup> Interview with youth activist 2, Chiang Rail: 2013

assigned.<sup>166</sup> While the high rate of impunity seems not to have decreased –as previously described–, in terms of the prosecution of competent officials that have incurred in human trafficking, the government only reported the ongoing investigation of a public official for human trafficking and the temporary transfer of a police superintendent for negligence in a human trafficking case; but there is no additional information about the details or the status of this case.<sup>167</sup> Certainly, if any real dent in the trafficking of children is to be made it is important to eliminate the collusion among law-enforcement agents, members of the judiciary, politicians, and organized crime.<sup>168</sup>

There have surely been governmental efforts to provide training to thousands of police officers on trafficking victim identification, on the provisions of the anti-trafficking law, and even specialized training for an additional 392 officers from the anti-trafficking unit.<sup>169</sup> However, the justice system has not yet seen the outcome of such investment, because the cases of corruption exceed the number of officials engaged with the protection of victims. Additionally, frequent personnel changes obstruct the government's ability to make progress on anti-trafficking law enforcement efforts.<sup>170</sup> In this regard, my sources indicate the remaining gap in the skills and capacities of governmental officers to actually address and provide assistance to victims.<sup>171</sup> Whether it is a result of incompetence or outright corruption, the agents of government who are legally charged with the responsibility to protect victims, should always be accountable for any act associated to child trafficking<sup>172</sup>.

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<sup>166</sup> United States Department of State, *2013 Trafficking in Persons Report - Thailand*, 19 June 2013, available at: <http://www.refworld.org/docid/51c2f3824d.html> [accessed 18 April 2014]

<sup>167</sup> Ibid.

<sup>168</sup> Clayton, Priyadarsini 2012:168

<sup>169</sup> United States Department of State, *2013 Trafficking in Persons Report - Thailand*, 19 June 2013, available at: <http://www.refworld.org/docid/51c2f3824d.html> [accessed 18 April 2014]

<sup>170</sup> Ibid.

<sup>171</sup> Interview Child Rights/Protection/Gender Advisor Plan International Thailand Foundation. Ke-  
ophaithool: 2014

<sup>172</sup> As established by Chapter 6, Section 54(5) of the Anti-trafficking in Persons Act of 2008.

### **3.2 Regional dynamics and the state's obligation to protect human rights**

With the recognition that child prostitution is an issue that affects multiple territories due to its trans-national network operations,<sup>173</sup> this analysis must also look at what happens at the regional level. In the Southeast Asian region, many are the dynamics around economic exchanges, and some are the steps jointly taken in direction of human rights protection. ASEAN, as the regional scenario in which human rights have gained a space is, so far, the only regional platform in which protection of children victims of commercial sexual exploitation is a topic of discussion.

As reviewed in chapter 2, during the last decade ASEAN has adopted declarations and established commissions in order to internalize and protect human rights within the region. However, so far, concerns remain in terms of the lack of regional enforcing mechanisms that effectively engage member states to accomplish their human rights obligations. This section will explore two of the main elements in this regard, namely: ASEAN principles as an interference for the state's duty to protect human rights; and the lack of regional mechanisms to uplift human rights violations –such child prostitution– to international justice.

#### **3.2.1 ASEAN principles in the light of human rights**

Although the Declaration on the Commitments for Children in ASEAN (2001) was an appropriate beginning for the state's commitment towards human rights, it was not until the establishment of the ASEAN Intergovernmental Commission on Human Rights (AICHR) that human rights violations happening in ASEAN countries became politically visible and officially denounced. Despite the fact that the idea of creating a human rights mechanism in the region had been discussed since 1993, the AICHR only came into being in 2009. Thus, it was the ASEAN Charter, which was launched in 2007, the instance that provided the

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<sup>173</sup> IOM, 2000:19



ASEAN with a constitutional foundation,<sup>174</sup> and the emergence of the AICHR materialized within the agreements of this Charter.<sup>175</sup>

As outlined in Chapter 2, the terms of reference for the AICHR are based on the principles that characterize the ASEAN functioning. While it is undeniable that the ASEAN Way principles permeate all the ASEAN bodies, and may be helpful for the preservation of sovereignty of member states, for the matter of human rights issues the application of such principles might become counterproductive. The two most problematic principles when it comes to human rights violations are the principle of non-interference, and the principle of informality. The former may take several forms that vary from abstaining from criticizing other government's actions –and being exposed to active condemnation if does the opposite–, to support materially and politically the other governments in their campaigns against dissident activities.<sup>176</sup>

According to my sources, the application of the principle of non-interference in human rights issues leads to a powerless role of neighbor countries to advocate for the protection of victims.<sup>177</sup> If the ten ASEAN member states do not have the external pressure towards their incapacity to suppress human rights violations such as child prostitution, what can be expected for the victims that cannot find justice in the national level? It seems contradictory that whereas the AICHR guidelines promote the adoption of international human rights standards, the principles leading its functions restrict most of its autonomy to process human rights denounces. As argued by Forum-Asia, these contradictions are of serious concern as it leaves space for governments to justify human rights violations rooted in 'regional particularities' and cultural relativism without any possibility of objection.<sup>178</sup>

Recognizing the important steps that have been taken by ASEAN countries towards human rights protection, it needs to be said that the application of ASEAN Way principles might

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<sup>174</sup> Cockerham, 2010:165

<sup>175</sup> Munro, 2011:1186

<sup>176</sup> Acharya, 2009: 78

<sup>177</sup> Interview East-Asia programme associate of Forum-Asia. Kuan: 2013

<sup>178</sup> Forum-Asia, 2013:118

not be the best guideline to address human rights violations. The application of the informality principle is a threat for the preservation of human rights in the region, because the implication of keeping human rights obligations in the level of “informality” put in risk the principle of accountability promoted from a human rights-based approach. In this sense, the principle informality in human rights terms leads to non-binding declarations and plans of action.<sup>179</sup> One example is the limited scope of instances such as the AICHR and the ACWC whose decisions are relegated to the political will of states to implement them or not. Hence, it is pertinent to stress on the importance of having coherent frameworks both domestically and regionally, so international human rights standards find a place to be successfully implemented.

### 3.2.2 The nonexistent enforcement mechanisms

If mechanisms are the instruments to preserve the rule of law in the exercise of justice, their existence and application should not depend upon political desires and/or circumstances. As clarified by the CRC General Comment 2: “*Children’s human rights issues are not constrained by national borders and it has become increasingly necessary to devise appropriate regional and international responses to a variety of child rights issues (...)*”.<sup>180</sup> Therefore, both standards and mechanisms at local, regional, and international level are expected “*(...) to resolve human rights problems affecting both countries and regions*”.<sup>181</sup>

Whereas the regional commitment towards human rights obligations is still under construction, other factors influence the inefficiency of Thailand in the elimination of child prostitution. If the application of ASEAN Way principles functions as an obstacle for accountability of states on human rights issues, the lack of enforcement mechanisms makes it even more difficult for both victims and human rights activists. Indeed, the lack of enforcement mechanisms within the AICHR has been highlighted as one of the major general weakness-

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<sup>179</sup> OHCHR. Background on ASEAN. Available at: [http://bangkok.ohchr.org/files/Regional\\_Dialogue\\_ASEAN\\_Background\\_Paper.pdf](http://bangkok.ohchr.org/files/Regional_Dialogue_ASEAN_Background_Paper.pdf) [Accessed: April 20, 2014]

<sup>180</sup> CRC, General Comment 2:29

<sup>181</sup> Ibid.

es of the body.<sup>182</sup> Since consensus is another principle applied to the operation of ASEAN, in the case of the AICHR, it is exactly that aspect which has not yet allowed the establishment of enforcement mechanisms to ensure that human rights are efficiently protected and promoted in the region at all levels.

Regional human rights mechanisms emerged and spread globally to tackle the issue of non-compliance at the national level. According to the Office of the High Commissioner for Human Rights (OHCHR), their nature is to open paths to ensure international human rights standards:

*“Where domestic legal proceedings fail to address human rights abuses, mechanisms and procedures for individual complaints or communications are available at the regional and international levels to help ensure that international human rights standards are indeed respected, implemented, and enforced at the local level.”*<sup>183</sup>

The AICHR was created as a consultative intergovernmental body.<sup>184</sup> As such, the scope of the Commission is restricted to the political interest and will of governments to implement the recommendations. Indeed, the Terms of Reference is characterized by the absence of explicit protection provisions and functions. In this regard, one of the implications is that the commissioners are not mandated to *“investigate individual complaints, conduct on-site visits, hold public hearings and establish special rapporteurships (....)”*.<sup>185</sup> Given the domestic circumstances, children victims of commercial sexual exploitation in Thailand remain unprotected under the regional system due to the lack of mechanisms to enforce the re-establishment of the rights of victims.

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<sup>182</sup> Forum-Asia, 2013b:120

<sup>183</sup> OHCHR

<sup>184</sup> Forum-Asia, 2013a:33

<sup>185</sup> Ibid.

### 3.3 The use and misuse of international standards

So far, this chapter has developed the domestic factors that have influenced the inefficiency of the Thai government in the elimination of child prostitution. With special focus on the gaps in the implementation of legal frameworks, it has shown that the “flexibility” in protecting children might be the result of the regional weaknesses that do not demand enough measures and sanctions from the Thai government in regards to child trafficking. Having explained the restricted scope of regional bodies and the remained lack of legal enforcement, this section discuss two relevant aspects of the international standards that are used and misused by states in order to avoid full compliance with their child rights obligations, namely: the matter of “adulthood”, and the dual criminality principle in the light of the OPSC. By the end of this section, I will show how the use and misuse of international standards in Thailand do affect the efficiency of the state in the elimination of child prostitution.

According to the Article 1 of the CRC, “*a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier*”.<sup>186</sup>

To have an idea, at least fourteen are the number of countries whose age of majority is below eighteen years old.<sup>187</sup> Although the definition of the age of “adulthood” varies from country to country, the implications of the threshold drastically change children’s lives. Whereas the ILO Convention No. 138 and 182 prevent states from the worst forms of child labour, the applicability of these provisions depends on the domestic laws that rule the age of majority and the adult activities that are expected with it. There is certainly no international standard to regulate the minimum age to preform certain tasks that are associated with adulthood –included marriage and labour–.<sup>188</sup> In this sense, the CRC General Comment 13 (2011) is the only supplementary provision that stresses on the protection of *all* children below eighteen years old against all forms of violence regardless the nature of the age of majority. Thus, the General Comment 13 covers *all children emancipated inade-*

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<sup>186</sup> CRC, Article 1

<sup>187</sup> UNICEF, 2011:9

<sup>188</sup> Ibid.

*quately or improperly* including young persons without obvious primary or proxy caregivers, such as “*children in street situations, children of migrating parents or unaccompanied children outside their country or region*”.<sup>189</sup> Though the General Comment 13 provides relevant guidance to protect *all* children below eighteen years old, the provision is essentially –and almost exclusively– in relation to the right to freedom of all forms of violence.<sup>190</sup>

The risks that children already face in countries in which the age of majority is low, might trigger greater vulnerability of victims when the principle of dual criminality is used as a tool of impunity. In the spirit of the OPSC the principle of dual criminality must not be an argument against extradition for crimes committed according to the definitions of Article 3.<sup>191</sup> Nevertheless, many are the number of states that do not comply with it. Thailand, as my case of interest, establishes in the Extradition Act of 2008 that the “*offence committed should be recognized as a criminal offence in both countries including the country requesting extradition*”.<sup>192</sup> It implies that jurisdiction over offences under the OPSC necessitates dual criminality in order to be recognized and proceeded extraterritorially.<sup>193</sup>

In such scenario, if a perpetrator of child prostitution is a foreigner in Thailand (country A) and assuming that prostitution is illegal in Thailand but legal in the perpetrator’s residence country (B); the country B is not part of the list of fourteen countries that Thailand has agreement with for offences related to the OPSC; and on top of it, if the country B has an age of majority below eighteen years old, the result might be as follows: the perpetrator would not be subject of extradition because prostitution is legal in country B, which implies that country B will not request the perpetrator to be prosecuted; even if child prostitution constitutes a crime in country B the case would be dismissed because the victim might be

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<sup>189</sup> CRC, General Comment 13:Para 35

<sup>190</sup> See CRC, Article 19. Although the provision includes exploitation within the forms of violence against children, the General Comment 13 does not supplement the content of the CRC Articles directly addressing child trafficking, namely: Articles 32, 34, 34, 35 and 36.

<sup>191</sup> UNICEF, 2008:4

<sup>192</sup> NGO Group for the CRC, 2012:6

<sup>193</sup> Committee on the Rights of the Child. Concluding observations: Thailand. Paragraph 30.

an “adult” according to the domestic law. Besides, if country B does not appear in the list of bilateral agreements to execute extradition for offences under the OPSC, the case would be pretty much dismissed from the very first instance due to the absence of extradition agreement.

Certainly, if the previous case scenario is the kind of justice for children victims of commercial sexual exploitation, then one might think that justice is not a valuable term. For this reason, Thailand is now expected to ensure that domestic legislation enables it to establish and exercise extraterritorial jurisdiction, and including extraterritorial jurisdiction without the criterion of dual criminality, as requested by the OPSC.<sup>194</sup> A history of child protection in the world is yet to be available,<sup>195</sup> and undoubtedly, many are the remaining actions to be taken.

### **3.4 The social side of the legal gaps**

While the weak existing legal frameworks and the lack of enforcement play a central role in the inefficiency of states to suppress child prostitution, the perpetration of these dynamics are highly nurtured by political and social factors. Poverty and increased economic inequality are important risk factors associated with child trafficking and commercial sexual exploitation of children.<sup>196</sup> Indeed, most trafficking victims come from families in poor communities lacking in economic and job opportunities.<sup>197</sup>

Structural causes associated with human trafficking can constitute an obstacle to tackle the legal weaknesses in the elimination of child prostitution. In this sense, though there are many structural contributing factors, I have found that issues related to migration are the most sensitive phenomena significantly affecting the suppression of child prostitution in Thailand. At villages, as Mrs. Keophaithool claims, poor people are exposed to trafficking because in many cases their condition as illegal immigrants –together with the lack of edu-

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<sup>194</sup> Committee on the Rights of the Child. Concluding observations: Thailand. Paragraph 30.

<sup>195</sup> Hart, Lee, Wernham, 2011:971

<sup>196</sup> Shifman, 2003:126

<sup>197</sup> Farr, 2005:143

cation or life skills to claim their rights– pushes them to trafficking networks.<sup>198</sup> Having said that, trafficking can be divided into two categories: cross-border international trafficking, and internal trafficking within the borders of a country or state.<sup>199</sup> Such distinction is crucial for the prevention of child prostitution, considering that trafficking cannot be neither equated nor understood in the same line than smuggling. The former implies the coercion or manipulation of a person to enter the industry, whereas smuggling more aptly refers to a participant's willingness to move illegally across borders.<sup>200</sup>

Thus, this section will outline the extent to which migration represents a control variable in the elimination of child prostitution by showing the contributing aspect of this situation to the risk of children to be exploited, and how all the conditions around this issue affects the effective implementation of legal frameworks to combat the commercial sexual exploitation of children. Likewise, this section will argue how the Thai political unwillingness to prioritize actions towards the issue of child prostitution has found in civil society an alternative to substitute the state's obligation to protect children.

### 3.4.1 Migration

Crossing the country from Bangkok to the south by bus is not the same experience as doing it coming from the north to Bangkok. Especially, because going to the south from Bangkok does not imply the strict police controls that take place when coming from the north. While being in the concrete jungle of Bangkok, it is hard to think that only twenty percent of Thailand is urban.<sup>201</sup> But it does not take too long outside the capital to notice how the rural life is a central part of the Thai society. Scholars such as Heather Montgomery have identified through their studies that most of the children exploited by the sex industry come from the north of the country. Indeed, Chiang Rai and Chiang Mai are the two

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<sup>198</sup> Interview Child Rights/Protection/Gender Advisor Plan International Thailand Foundation. Ke-  
ophaithool: 2014

<sup>199</sup> Chase and Statham, 2004:43

<sup>200</sup> Brandy, 2014:11

<sup>201</sup> Ministry of Public Health. Thailand Country Profile. Available at:  
[http://www.moph.go.th/ops/thp/images/stories/Report\\_pics/CD\\_ROM53/Eng/Chapter2.pdf](http://www.moph.go.th/ops/thp/images/stories/Report_pics/CD_ROM53/Eng/Chapter2.pdf) [Accessed: 1st of March, 2014]

northern cities with more NGO's intervention to prevent child trafficking, and certainly not by coincidence. As my sources suggest, poverty and social inequality remain problematic in Thailand, especially in rural areas in the Northeast and North regions; this situation has led to the marginalization of ethnic minorities, immigrants, refugees and poor communities.<sup>202</sup> In the words of the youth activist 1, “even the long neck communities<sup>203</sup> are exposed to exploitation by being sold as human safari experiences because otherwise they will be expelled from the country”.<sup>204</sup>

Given Thailand's geographical location and economic strengths as compared with its neighboring countries, many foreigners continuously pour across the borders into the country to look for jobs.<sup>205</sup> However, many of the immigrants find themselves into situations of exploitation and abuse along their journey. For instance, there are cases in which Thai police officers and immigration officials reportedly extorted money or sex from Burmese citizens detained in Thailand for immigration and sold Burmese migrants unable to pay labor brokers and sex traffickers.<sup>206</sup> Children that are trafficked from neighbor countries are actually exposed to similar situations.

Human trafficking differs from human smuggling in that human traffickers intend to exploit the person who is to be moved from one place to another. Besides, human trafficking often involves threats, violence, unlawful influence and coercion.<sup>207</sup> Although drawing the line between exploitation and smuggling might be difficult, children who are smuggled are

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<sup>202</sup> Interview Project Coordinator ECPAT Foundation. Chantakul: 2013

<sup>203</sup> Ancestral Kayan Tribe with origin Burmese. Known by women with long neck shaped and hold by brass rings. The long-neck women in Thailand are Burmese refugees who have being prevented by Thai authorities from taking up asylum overseas. See more in: *Exhibiting the 'Other' then and Now: 'Human Zoos' in Southern China and Thailand* (Alexander Trupp). See also: *Please Set Me Free*. Available at: <http://www.marieclaire.com/world-reports/news/kayan-long-neck-thailand>

<sup>204</sup> Interview youth activist 1, Chiang Rai: 2013

<sup>205</sup> MSDHS. Thailand's Annual Report on Efforts and Progress on the Implementation of Anti-Human Trafficking Action Plan in 2012. Available at: <http://www.nocht.msociety.go.th/album/download/08d77f3a6409a6d7dfa696b6fd16d331.pdf> [Accessed: April 8, 2014]

<sup>206</sup> United States Department of State, *2013 Trafficking in Persons Report – Thailand*. Available at: <http://www.refworld.org/docid/51c2f3824d.html> [accessed 18 April 2014]

<sup>207</sup> Kárlén, 2011:58



generally seen as extremely vulnerable for trafficking.<sup>208</sup> For instance, it can be the case in which children are offered to go to Thailand to get a job so they can help their parents with debts –that are very common in vulnerable contexts–<sup>209</sup>, but what the child and family generally ignore is that the human smuggler has already planned to sell the kid to be prostituted and exploited.<sup>210</sup> In many cases, as stated by Mrs. Chantrakul, victims are afraid of denouncing because the pimps –besides confiscating their documents– usually threaten them saying that the police will not do anything either because the owner has friends in there, or because of the “illegal” status of the victim in the country.<sup>211</sup>

Children are often also trafficked through well-structured networks, often with connections to organised crime networks in neighboring countries.<sup>212</sup> In this sense, when it comes to the risks of migration and child prostitution, distinction needs to be established between those who are at risk to be *forced* into prostitution and those who might be *driven by circumstances* into the sex industry. According to my fieldwork, the motivations for most of children victims of prostitution in Thailand are defined by the socio-economic circumstances that surround them.<sup>213</sup> Here, the “voluntary” aspect of those that have decided to be transported from one country to another to work cannot be isolated from the circumstances that have put the child in the position to make such decision.<sup>214</sup> Indeed, while blatant violence is sometimes used, traffickers generally use their familiarity with the victim to gain their trust while making a skilled sales pitch involving false promises of well-paying jobs, residency documents in more prosperous countries or marriage.<sup>215</sup> In many cases, pimps first identify their victims and then offer loans to the victim’s parents being aware of their economic

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<sup>208</sup> ECPAT, 2006:6

<sup>209</sup> The CNN Freedom Project, “Every day in Cambodia” Documentary, Available at: <http://thecnnfreedomproject.blogs.cnn.com/2013/09/25/every-day-in-cambodia/> [Accessed: April 17, 2014]

<sup>210</sup> ECPAT, 2006:6

<sup>211</sup> Interview Project Coordinator ECPAT Foundation. Chantrakul:2013

<sup>212</sup> United Nations Office of Drugs and Crime (UNODC). Trafficking in Human Beings: Global Patterns. Available: [http://www.unodc.org/unodc/en/trafficking\\_persons\\_report\\_2006-04.html](http://www.unodc.org/unodc/en/trafficking_persons_report_2006-04.html) [April 9, 2014].

<sup>213</sup> Interview Executive Director Childline Thailand. Smirnov: 2014

<sup>214</sup> Interview Project Coordinator ECPAT Foundation. Chantrakul:2013

<sup>215</sup> D’Cunha J. *Trafficking in persons: A gender and rights perspective*. Available at: <http://www.un.org/womenwatch/daw/egm/trafficking2002/reports/EPDCunha.PDF#search=‘Trafficking%20in%20persons%3A%20a%20gender%20and%20rights%20perspective%20Jean’> [Accessed: April 9, 2014].

need. Afterwards, the interest rates are over the parent's capacity to pay off the debt, and the pimp already knows how to make them solve the debt: taking their child for exploitation.<sup>216</sup>

In addition to that, my sources indicate that the government does not recognize many hill tribe groups as Thai citizens. The remoteness of their locations and the lack of trained personnel to conduct development and educational activities in their communities are added problem.<sup>217</sup> If those children are already vulnerable, those who have been trafficked across international borders are even more disempowered because they do not speak the local language and are less able to escape or seek assistance.<sup>218</sup> According to my fieldwork, the situation of statelessness triggers the vulnerability of children because besides being exposed to the traffickers, the government does not take care of them, because their condition of stateless makes them technically inexistent to the state.<sup>219</sup> As youth activist 2 points out, even when immigrant children are encouraged to continue their studies, many of them end up involved in prostitution because they know that even if they study, once they turn eighteen and will have to look for jobs, will find themselves rejected because no one will want to hire an illegal.<sup>220</sup> Therefore, in many circumstances, either because of the lack of information or because of the lack of distinction in the practice between migrants and trafficked victims, the enforcement of the laws to suppress commercial sexual exploitation of children and to prevent the structural social risks leading to trafficking remain limited in the Thai context.

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<sup>216</sup> The CNN Freedom Project, "Every day in Cambodia" Documentary, Available at: <http://thecnnfreedomproject.blogs.cnn.com/2013/09/25/every-day-in-cambodia/> [Accessed: April 17, 2014]

<sup>217</sup> Interview Project Coordinator ECPAT Foundation. Chantakul: 2013

<sup>218</sup> United Nations Children Fund (UNICEF). *Excluded and Invisible: The State of the World's Children, 2006*. Available at: [http://www.unicef.org/sowc06/pdfs/sowc06\\_fullreport.pdf](http://www.unicef.org/sowc06/pdfs/sowc06_fullreport.pdf) [Accessed: April 10, 2014]

<sup>219</sup> Interview Child Rights/Protection/Gender Advisor Plan International Thailand Foundation. Ke-phaithool: 2014

<sup>220</sup> Interview youth activist 2. Chiang Rai: 2013

### 3.4.2 Thai Political unwillingness and civil society as a response

One of the key problems in understanding and dealing with the issue of human trafficking is that it is deemed a crime only after it has happened.<sup>221</sup> In other words, whereas it is possible to prevent the risks, the actual cases of human trafficking do not constitute a crime unless specific offences constitute a fact. Therefore, a child victim of commercial sexual exploitation is not considered as a “victim” unless he/she has already experienced exploitation. For this reason, actions should address the problem since the very urgent preventive action for both those at risk and those that are already victims of the trafficking. Although the OPSC stresses on the importance of international assistance and cooperation,<sup>222</sup> it does not mean that the state is exempt of its obligation to protect children from the offences included in the provision. In this sense, though joint actions should exist towards the preservation of the integrity of children, the state should be the one leading and coordinating the actions.

In Thailand, civil society plays a central and active role in the prevention of child prostitution.<sup>223</sup> For instance, ECPAT –being the only organization with focus intervention in child trafficking– has provided assistance up to 3.000 children per year, but with an average of 25 children that have been captured by trafficking despite the year of process with the organization.<sup>224</sup> But civil society is not restricted to NGOs; social media has also carried out relevant projects –such as the CNN Freedom Project– in order to make visible the situation of human modern forms of slavery and child trafficking across the world. Besides, activists in the Southeast Asian Region have mobilized initiatives to give an opportunity of reintegration to victims that have been rescued from child prostitution.<sup>225</sup> Even religions have recently joint efforts through the *Global Freedom Network*, arguing their capacity to spread the message from the very basis of communities.<sup>226</sup> However, it seems that the more coop-

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<sup>221</sup> Sanghera, 2005:14

<sup>222</sup> See OPSC Article 10

<sup>223</sup> Interview Legal Programme Officer ECPAT International. Souchet: 2013

<sup>224</sup> Interview Project Coordinator ECPAT Foundation. Chantrakul:2013

<sup>225</sup> See 3Strands initiative. Available at: <http://www.3strandsglobal.com/index.cfm?PID=3331>

<sup>226</sup> See Global Freedom Network. Available at: <http://www.gfn2020.org/>

eration there is with the state, the more vulnerable is the possibility to make the state accountable for its human rights obligations.

Thai political instability coupled with the internal deficiencies in assigning responsibilities to implement policies on human trafficking, have left civil society on its own in the elimination of child prostitution. One example that helps to illustrate this situation is the observation made by the Committee on the Rights of the Child in relation to the *“fragmented and seriously limited and ineffective data collection system (...) that greatly limits the State’s capacity to monitor, assess and prevent offences under the OPSC”*.<sup>227</sup> In the line with this view, my sources bring attention to the inefficient operation of the hotlines to report cases, by knowing that weeks and even months have passed before the cases have been transferred to the competent instances.<sup>228</sup> Not in vane, organizations such as Childline exist to facilitate the assistance to victims.

For this reason, rather than notifying to the official authorities, organizations work together to prioritize the assistance in the shortest possible time. This is what NGOs such as Plan International Thailand Foundation does in association with the Development and Education Programme for Daughters and Communities Centre (DEPDC) and Childline.<sup>229</sup> This specific aspect, for instance, has a great influence in the information retrieving. As a consequence, there is no official reliable data because of the weak data collection system. If the state has not been able to even get a disaggregated data –that civil society organizations do have– on the issue of child prostitution, the expectations about the effective assistance cannot be higher than the states’ capacity to at least retrieve the basic information to proceed with actions.

According to the *2013 Trafficking in Persons Report*, Thailand has presented important irregularities around interagency coordination that, in addition, was weakened by a rudimentary data collection system that has made it difficult to share information across agen-

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<sup>227</sup> Committee on the Rights of the Child. Concluding observations: Thailand. Paragraph 7.

<sup>228</sup> Interview Child Rights/Protection/Gender Advisor Plan International Thailand Foundation. Ke-  
ophaithoool: 2014

<sup>229</sup> Ibid.

cies.<sup>230</sup> Political willingness is vital for the elimination of child prostitution. If agencies are created to coordinate actions in cooperation with other stakeholders, it is necessary to clarify the boundaries between the role of civil society organizations and the role of the state. Whereas governmental initiatives to prevent human trafficking are launched, it seems that in Thailand civil society organizations are the ones taking most of the actual actions for the protection of children in the field.

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<sup>230</sup> United States Department of State, *2013 Trafficking in Persons Report – Thailand*. Available at: <http://www.refworld.org/docid/51c2f3824d.html> [accessed 18 April 2014]

## 4 CONCLUDING REMARKS

While there is some overlap between different regions of the world, the issue of child prostitution is not identical everywhere. Despite the existence of international, regional, and domestic provisions to prevent the worst forms of child labour, the situation of children involved in commercial sexual exploitation is a global concern and exists as a modern form of slavery.

Taking Thailand as an exemplifying case, this study aimed to answer from a human rights perspective what factors may explain the inefficiency of the Thai government in eliminating child prostitution. Despite the ratification of both the CRC and the OPSC, this paper has shown the gaps in the implementation of the existing legal frameworks that affect the efficiency of the state in combating child sexual exploitation. In this regard, policy initiatives such as the Anti-trafficking in Persons Act of 2008 have made a remarkable difference in assisting victims. However, it has been argued that the lack of a precise definition of offences, the absence of a data collection system, the non-existent inter-agency coordination, and the high rate of impunity have made any attempt to monitor and evaluate the strategies applied difficult. While it is undeniable that child prostitution is a form of human trafficking, my findings indicate that the issue cannot be addressed together with other forms of trafficking. The vulnerability of children demands a special and categorical protection from the law; this is why there is an Optional Protocol that explicitly detaches the offences from the CRC.

In addition to the weak existing legal framework, this study has suggested that the situation of child prostitution in Thailand is intensified by political factors that come into play, such as the case of corruption. Although the Anti-trafficking in Persons Act criminalizes the enrollment of *competent officials* in acts of human trafficking, the findings of this research corroborate the political interest that might exist in the permanence of child prostitution. Corruption in Thailand has permeated the spheres of assistance for child victims of commercial sexual exploitation to an extent that makes the enforcement of the law even more difficult. Furthermore, the lack of regional enforcement mechanisms, together with the

principle of non-intervention that rules the functioning of ASEAN bodies are also contributing factors to the flexibility of the state in the suppression of child prostitution.

Besides the legal and political factors, I have argued that the implementation of laws in Thailand is drastically affected by social conditions related to immigration. Whereas an important distinction needs to be established between smuggling and trafficking, it is important to note that even illegal immigrants are exposed to trafficking. In this sense, this study has found in the lack of opportunities for reintegration, the deficient communication skills, and the risk of being re-victimized by official authorities –due to the illegal status in the country when inspections take place–, aggravating aspects for the elimination of commercial sexual exploitation of children. Although Thailand is one of the pioneer countries in the signature of the 3<sup>rd</sup> Protocol to the CRC on Communication Procedure, in a short term future relevant steps need to be taken at the domestic level towards the protection of child victims. With an active civil society mobilizing actions and accountability in the country, I have outlined the importance to continue promoting joint actions, but also to clearly define the role of stakeholders so the state can maintain its function as the ultimate guarantor of rights.

After identifying legal, political, and social contributing factors to the inefficiency of the Thai government in the elimination of child prostitution, it can be said that addressing such a situation requires a multilevel intervention able to: strengthen the existing legal frameworks; counteract the political variables that hinder the enforcement of the law; and generate the social conditions to protect children at risk from commercial sexual exploitation. Considering these challenges, the remaining question should be: To what extent is the suppression of child prostitution a real priority of the state?

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